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• Current Events •

Affiliation of American Bar Association Announced at Recent Meeting of International Union of Lawyers in Vienna—Fundamental Principles of Civil Procedure, Rights of Married Women, and Conferences Between Lawyers and Press in Connection with Trials among Subjects Discussed

AFFILIATION of the American Bar Association with the International Union of Lawyers was announced at the recent meeting of that organization held in Vienna on Sept. 3-6. The announcement was received with enthusiasm by the officers and delegates, according to a report received from Mr. Pendleton Beckley, who represented the American Bar Association at the meeting. Mr. Beckley was on his way to Vienna to attend the sessions in the role of observer, when he received a cable informing him of the action of the American Bar Association and his appointment as one of the official representatives of the organization.

Although President Ransom had also appointed Messrs. Joseph Du Vivier, Donald Harper and John B. Robinson as delegates to the meeting, they were not able to be present because of the short time between the meeting of the Association in Boston and the Congress of the Union.

In his report to the Congress Maître Louis Sarran, the Secretary General, stated how much this affiliation should mean to the countries in Europe and to the future of the Union. He added:

"We owe warm thanks to those of the American Bar Association who have accepted and approved of this affiliation. First of all, the President, William L. Ransom, then John H. Wigmore, the President of the Committee two years ago, and the President of the present Committee, Frederic R. Coudert, and our friend Pendleton Beckley, who has been present at our various meetings as observer on behalf of the Association for some years, and whom the vote of affiliation at the Boston meeting has just made the first ambassador to the Union of the great American Bar Association."

Twenty-two countries were represented, which number included the Bar Associations of Italy, Sweden, Norway, Denmark, Finland, Brazil and the United States which have recently become members of the Union.

The work of the Congress was directed principally to the following questions: (1) Fundamental principles of a civil procedure simplified and modernized. (2) Legal rights under civil laws of married women in different countries. (3) Discussion of cases and evidence between the members of the Bar and the press before, during and after a trial. (4) The possibility of an international guarantee with reference to the use of affidavits or statements under oath in Latin or code countries.

The leader of the discussion as to fundamental principles of court procedure was Maître Siegfried Kantor, Bâtonnier of Vienna, Vice-President of the Union. It was quite evident from the interest manifested by all of the delegates that a simplification in the procedure and a reduction in the cost of litigation were urgently demanded. The debates went directly, for the most part, to obtaining a more speedy and less costly administration of justice.

The leader of the discussion as to the rights of married women was Maître Séjourné, former Bâtonnier of the Bar of Orleans, France, and President of the Order of Bâtonniers from the various departments of France.

It resulted, from his study and report on this question, that most of the countries are now trying to find a way to lessen the situation of inferiority which the law imposes on married women. As this difference under the law has existed for many years and in some cases is the outcome of a natural and ancient custom of the people themselves, it was suggested that only time and fundamental modifications could bring about the desired result.

By reason of the complexity of the question presented, which held for each country an economic as well as a social problem, it was proposed that each member country of the Union should study this question, that the same might be fully discussed at the next Congress of the Union.

The Congress, however, following the above decision, adopted by a unanimous vote a resolution approving the legal equality of women with men in all matters of international law.

The leader of the discussion as to conferences between members of the Bar

and the Press before, during and after a trial was Maître Charles Gheude, "Secrétaire Général de l'Union Internationale des Avocats." Following a discussion of his report, the delegates decided that it should be considered against the dignity of the legal profession or that of one collaborating in the administration of justice to have conferences with the press before, during or after the trial of the cause. It was decided in principle that the members of the Bar should not give interviews to the press and that the only publicity which should be carried on in the press should be that of the actual trial, proceedings or hearing of the cause.

The leader of the discussion as to an international guarantee with reference to the use of affidavits or statements under oath in Latin or Code countries was Maître Franz Pranter, Jr., of Vienna. He showed how, in Austria, by agreement with Great Britain, affidavits produced under certain conditions were accepted as proof of their contents. For such a plan to become general, it was suggested that the present restrictions in most European countries as to the admission of affidavits and documents under oath should be simplified. It was thought that the acceptance of such documents might be facilitated by legislation in the various countries. It seemed to all that it would be highly desirable to have the use of affidavits and statements under oath accepted both by tribunals and administrative bureaus as proof of their contents.

The following additional matters were presented during the sessions and discussions by the delegates: "Contempt of Court and Its Punishment"—discussion led by the Bâtonnier Demay, of Belguim; "Insurance Against the Professional Liability of a Lawyer"—discussion led by Maître Lenhoff, of Vienna; "The Constitution of Administrative Courts"—discussion led by Maître Appleton, of France; "The Creation of International Courts Having Jurisdiction Over the Expulsion from a Country of Other Nationals of Other Countries"—discussion opened by Me. Sarran, of France.

The Congress, in its final session, elected the following officers for the year 1936-1937:

Honorary President: Me. Jean Appleton (France).

President: Dr. Alois Stömpfe (Czechoslovakia).

Vice-Presidents: Dr. Siegfried Kantor (Austria), Dr. Stanislas Rowinsky (Poland), Dr. Georges Vaes (Belgium), Me. Pendleton Beckley (United States of America), Me. Dino Vidali (Italy), Me. Georges Petrovici (Roumania).

General Secretaries: Me. Louis Sarran (France), Me. Charles Gheude (Belgium), also assuming the functions of treasurer.

Member in charge of publicity and propaganda: Me. Constant Ionesco (Roumania).

In electing a representative of the American Bar Association as Vice-President, the Union wished to show its appreciation of the affiliation of the American Bar Association with the Union.

The next Congress of the Union will likely be held in Egypt, although this is a matter which will be confirmed at a later date by the officers of the Union.

"In closing this report," says Mr. Beckley, "I feel that I should mention the unusually cordial friendship and the hospitality of the Vienna Bar, which was manifested in so many ways to all of the delegates."

"Political Calendar" of the Association for the Current Year—Vacancies in Office of State Delegate to Be Filled in 1937—Members of Board of Governors to Be Elected from Three Circuits in 1937—State and Local Bar Associations to Choose Own Manner of Selecting Delegates, Etc.

THERE will be interest in what may be termed the "political calendar" of the American Bar Association during the Association year to end with the sixtieth annual meeting, in Kansas City, Missouri, next September.

Under the new Constitution of the Association, the controlling date, in relation to which the various items of the schedule of nominations are fixed, is that of the opening of the annual meeting. Until that date is fixed, the limiting dates for the various processes of nominations, etc., cannot be exactly determined. It is regarded as likely, however, that the Kansas City convention will open after September 15, 1937.

General elections for the office of State Delegate from the respective States will not take place until 1938, when the three-year terms of those elected in Los Angeles will expire. In 1937, several vacancies in the office of State Delegate will be filled by nomination by petition and election by mail ballot. Such elections of State Delegates will take place in 1937 in Maryland, Illinois, Arkansas, and possibly other States, as well as in the territorial group.

Not less than 150 days before the opening of the annual meeting, 25 or more members of the American Bar Association in the State which is to elect a State Delegate may file with the Association's Board of Elections a petition making a nomination for the office of State Delegate. Each such nomination, with the name of the signers of the petition, is thereupon published in the AMERICAN BAR ASSOCIATION JOURNAL. Not less than 120 days before the opening of the annual meeting, the Board of Elections will send out printed ballots, with the names of all nominees for State Delegate from such State, to all members of the American Bar Association in such State. The ballots are to be returned to the Board of Elections, not later than a date to be fixed by the Board of Elections, to be not later than sixty days before the annual meeting. Nominations and elections of State Delegates this year are to fill vacancies that now exist or may arise before February 15, 1937. Any member of the American Bar Association in a State is eligible to be a State Delegate, or to sign a nominating petition and to vote by mail ballot.

Nominations for the offices of President, Chairman of the House of Delegates, Secretary, and Treasurer, of the Association, and for members of the Board of Governors, will be made in first instance by the State Delegates. In 1937, a member of the Board of Governors will be elected from each the Third, Fifth and Ninth Judicial Circuits.

Nominations by the State Delegates are required to be made, not later than seventy days before the annual meeting, which would mean not later than about July 5th. Nominations by the State Delegates must be promptly published. Whether the State Delegates will make their nominations at the time of the mid-winter meeting of the House of Delegates, at Columbus, Ohio, early in January, or at a later meeting in Washington, D. C., early in May, will rest with the State Delegates for decision. In either event, there will be plenty of time for Association members to know, consider and discuss the nominations made by the State Delegates, and to make known their views and wishes about them.

Independent nominations for any office, including members of the Board of Governors, may be made by petition, not earlier than seventy nor later than forty days before the opening of the

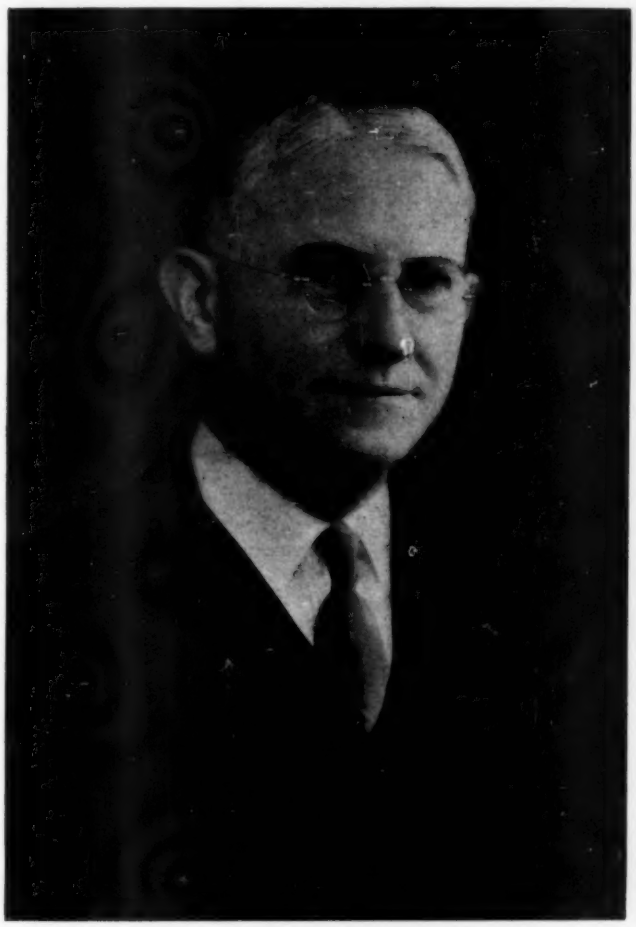
annual meeting. Independent nominating petitions are to be signed by not less than 200 members of the Association, of whom not more than 100 may be accredited to any one State. The consent of each nominee has to accompany a petition.

All nominations made for any office, including members of the Board of Governors, are to be published in the next issue of the AMERICAN BAR ASSOCIATION JOURNAL, so that Association members in each State will have full opportunity to discuss the nominations and make known their views about them, to their representatives in the House of Delegates. Election of the Association officers and the members of the Board of Governors will take place in the House of Delegates, at the annual meeting in Kansas City. The Delegates of the State Bar Associations and participating local Bar Associations constitute the largest numerical element in the House of Delegates. Only members of the American Bar Association may be nominated. The nominees for members of the Board of Governors have to be members of the House of Delegates at the time of their nomination; but this restriction does not apply to the offices of President, Chairman of the House of Delegates, Secretary or Treasurer of the Association.

All arrangements for the elections, including the forms of nominating petitions, the printed ballots, the counting of the ballots, etc., will be in the hands of a Board of Elections, soon to be chosen by the Board of Governors. Three disinterested members of the Association, not members of the House of Delegates, will constitute the Board of Elections, whose Chairman will be a member of the highest Court of law of a State.

It is believed that the new procedure for nominations, giving to all of the members of the Association an opportunity to take part, and the new procedure for the nomination of the State Delegates by petition and their election by mail ballot, will greatly broaden the interest and participation in the affairs of the Association. It is likewise anticipated that the election of the general officers of the Association by the House of Delegates will ensure a representative and deliberative choice, with all of the States taking part through their chosen Delegates.

The manner in which each State Bar Association and participating local Bar Association shall choose its Delegate or Delegates, rests with the members of the State or local Association to determine. The Constitution of the American Bar Association leaves to the State and local Associations the decision as to the mode of selecting their Delegates.



MANLEY O. HUDSON

Manley O. Hudson Elected to Membership on the Permanent Court of International Justice—Fourth American Jurist to Receive That Honor—His Work and Long Experience in the Field of International Law

DR. MANLEY O. HUDSON, Bemis Professor of International Law at Harvard University, was elected a judge of the World Court of Justice early in October. He succeeds Hon. Frank B. Kellogg, former Secretary of State, and is the fourth American to sit on the World Court Bench. The American Bar will feel real satisfaction at this deserved honor which has come to one of its distinguished members.

We are glad to print the following note about Judge Hudson and his work, which Prof. James W. Garner, of the University of Illinois, kindly consented to prepare for the JOURNAL:

The election of Manley O. Hudson, professor of international law at Harvard University, to succeed Mr. Frank B. Kellogg as a judge of the Permanent Court of International Justice was almost a foregone conclusion from the time of Mr. Kellogg's resignation. His nomination in accordance with the statute of the Court by the American members of the Hague Court of Arbitration, other than himself, was in due course followed by the nominations of thirty-nine other countries—a larger number by ten than any previous candidate had ever received.

Mr. Hudson's election brings to the Court not only a jurist with preeminent qualifications but one whose interest in the judicial settlement of international disputes has been one of his chief preoccupations in life. Ever since the establishment of the Court he has been a tireless advocate of American membership of it. Before bar associations, learned societies and popular meetings in every part of the country he has ex-

plained the purpose and rôle of the Court and pleaded for the adherence of the United States to the protocol of signature. Each year he has published in the American Journal of International Law an annual review of its work with an analysis of its decisions, and recently he edited and published in two volumes with valuable historical and critical notes a collection of its judgments and opinions. He is also the author of a monumental work on the Court dealing with its history, procedure and jurisprudence, covering the first twelve years of its existence. This work is regarded everywhere as the standard treatise on the subject and it reveals the extraordinary familiarity of the distinguished author with its history, procedure and decisions—a fact which caused one of the judges to remark that Mr. Hudson is more familiar with these matters than the judges themselves are. In this connection it may be stated that the official reports of the Court list more than 140 articles, reports and books written by him relating to the Court.

Mr. Hudson has had a large practical experience in international affairs. He was one of the group of experts who accompanied President Wilson to the Peace Conference at Paris and assisted in drafting certain of the treaties. He was for the first two years of its existence a member of the legal section of the Secretariat of the League of Nations and has spent most of his summer vacations on its staff since then. In this capacity he served as legal adviser to the International Labor Conferences at Washington in 1920 and at Genoa in 1921. He was one of the legal experts attached to the American delegation to the Hague Conference on the Codification of International Law in 1930 and in 1933 he was appointed by President Roosevelt as a member of the Permanent Court of Arbitration popularly known as "the old Hague Court."

For several reasons Judge Hudson should bring strength and even prestige to the Court. He is a relatively young man with a vigorous and rugged personality, deeply interested in the future of the Court and is not likely to resign his judgeship, as all three of his American predecessors did. He is a man of indefatigable industry and possesses what has seemed to those who have worked with him an almost unlimited capacity for sustained intellectual and physical labor. As stated above, no one, unless it be the registrar of the Court, who has now been elected one of its judges, is more familiar with its procedure and jurisprudence. And, most important of all, he is an outstanding international jurist. He possesses immense learning in the general field of international law and it is doubtful if there is any one—certainly not in the United States—who is more familiar with that part of the law found in treaties and conventions, the interpretation of which is one of the principal tasks of the Court.

JAMES W. GARNER.
University of Illinois.

Kansas City Selected As Place for Association's Next Annual Meeting—Date to Be Announced Later by Committee on Arrangements—Remarkable Facilities for Meeting and Entertainment of Delegates Offered by Convention City

THE next Annual meeting of the American Bar Association will be held in Kansas City. The decision was reached at a meeting in Boston of the Board of Governors which took office upon the adjournment of the Fifty-Ninth Annual Meeting. The Committee on Arrangements will fix the date. The September issue of the Kansas City Bar Bulletin makes the following comment on the acceptance of the invitation from that city:

"The American Bar Association at its annual meeting held in Boston voted to accept the invitation extended by the Kansas City Bar Association to hold its next annual meeting at Kansas City. The Kansas City Bar Association inaugurated a drive to obtain the 1937 convention of the American Bar Association more than a year ago. General John T. Barker, member of the council of the American Bar Association from Missouri and chairman of the program committee of the Kansas City Bar Association, arranged the programs of the local association so that almost all of the members of the executive committee and council of the American Bar Association had an opportunity to personally view the convention facilities offered by Kansas City prior to the time they would be called upon to express their preference for a place at which to hold the 1937 meeting. Prior to the time of the Boston meeting almost all of the officials of the American Bar Association were convinced that the 1937 meeting of the association should go to Kansas City."

It adds that strong but unsuccessful bids were made for the meeting by several other important cities.

The facilities for entertaining the meeting which Kansas City offers could hardly be excelled. It has a magnificent Municipal Auditorium which was built after a thorough study of the requirements of practically all of the country's largest conventions and trade shows and was designed to meet those requirements. It is modern and adaptable throughout, air-conditioned, and is located in the heart of downtown Kansas City. The facilities of the auditorium comprise seventeen meeting halls with seating capacities of from 100 to 14,000, twenty-one committee rooms with seating capacities of 25 to 100.

The hotel accommodations are on the same large and satisfactory scale. "Approximately 5,000 rooms are available in downtown hotels and 2,000 more in outlying apartment hotels. Each of the larger hotels has facilities for meetings, banquets, and convention activities generally. Rates throughout are extremely moderate and services are of the finest.

During the course of the year the JOURNAL will give further information as to the many interesting features which Kansas City offers to those who attend the Annual Meeting.

St. Thomas More Society of America Formed

AT a luncheon held in Boston on Aug. 26, during the meeting of the American Bar Association, which was sponsored by the law alumni of the Catholic University of America and attended also by a number of prominent law teachers from other law schools who are interested in the work of the school, though not alumni, there was formed the St. Thomas More Society of America, a non-denominational organization which will seek to interest the American Bar in studies in English Legal History and in the life and high juridical idealism of the recently canonized Saint. The establishment of a St. Thomas More Library and Museum at the Catholic University Law School is contemplated. Meetings will be held throughout the year. A Council for 1936-1937 was elected, consisting of the following: Hon. Clarence E. Martin, President, Professor Walter B. Kennedy, Vice-President, Professor H. Milton Colvin, Professor John W. Curran, Professor John C. Fitzgerald, Mr. Arthur J. O'Dea, and Dr. Brendan F. Brown, Secretary-Treasurer.

Multnomah Bar Association of Portland, Oregon, Held to Have Pursued Activity of Greatest Benefit During Past Year—Award of Prize Made by Committee on State and Local Bar Activities of Conference of Bar Association Delegates—Something about Committee's Constructive Work

THE Multnomah Bar Association of Portland, Oregon, is credited with "the local activity deemed productive of the most benefit to members of the Bar or the public generally" during the past year, according to the decision of the Committee on State and Local Bar Activities of the Conference of Bar Association Delegates. This decision was reached by the Committee at a meeting held in Boston on August 26 for the purpose of deciding which Association should receive the E. Smythe Gambrell Award of $25 for the most outstanding activity of the character mentioned.

For the greater part of last year the Committee published a bi-monthly Bulletin containing reports of such activities from Bar Associations all over the country. The main object of the publication, of course, was to keep each of these Associations informed of the constructive activities of all the other Associations, so that it might follow such examples as it desired. These Bulletins furnished a treasure house of really valuable suggestions. In the March issue the Committee stated that "the March Report has a larger number of items contributed by local Bar Associations than either of its two predecessors. As an additional inducement to such contributions, we have been authorized to announce that a prize of $25 will be awarded to the local Bar Association sending in the report of the local activity deemed productive of the most benefit to the members of the Bar or to the public generally. These stories will appear in the remaining monthly reports for the Associaton year. If you think that your Association has done something which might qualify in this connection, send it in."

Following is the letter from Mr. John A. Beckwith, President of the Multnomah Bar Association, in which he reported the activity of the Association which the Committee regarded as the most useful:

MULTNOMAH BAR ASSOCIATION

Portland, Oregon
June 13, 1936.

Mr. Will Shafroth
Director of the National Bar Program
American Bar Association
1140 North Dearborn Street
Chicago, Illinois

Dear Mr. Shafroth:

The information which I am sending in this letter may be of interest for your monthly report.

The lawyers of the Multnomah Bar Association at Portland, Oregon, held a poll of the lawyers of the county for judiciary candidates. The Bar Association sent a notice of this poll to 960 registered lawyers in the county. The vote was held in the County Court House in a room provided by the County Clerk. Special ballots were printed containing the names of the judiciary candidates. 611 lawyers voted between 9:00 A.M. and 5:00 P.M. The result of the vote was very satisfactory and every candidate receiving the highest number of votes from the lawyers stood in first place at the primary election which was held throughout the state two days later. Oregon has the non-partisan judiciary ballot so that none of the candidates were permitted to designate on any ballot their party preference. It was considered necessary to hold this lawyers' poll exactly two days before the election so that none of the candidates could use the lawyers' result in their campaign.

The result of the lawyers' vote for every candidate was announced in the newspapers. A statement by the Bar Association was published to the effect that this vote was taken for the information of the public and not for the purpose of endorsing any candidate for judicial office. The public deals with the courts through the lawyers, and should be interested in knowing how the lawyers feel about the candidates for judgeship. Yours truly,

(Sgd.) JOHN A. BECKWITH,
President.

Following is the letter from Hon. R. Allan Stephens of Springfield, Ill., in which he announced the Award to the Multnomah Bar Association:

September 9, 1936.

Honorable John A. Beckwith
Porter Building
Portland, Oregon

My Dear Mr. Beckwith:

The Committee on State and Local Bar Activities of the Conference of Bar Association Delegates met in Boston August 26 to award the prize offered by E. Smythe Gambrell, Chairman of the Conference, "to the local bar association sending in the report of the local activity deemed productive of most benefit to the members of the bar or to the public generally." A number of reports were considered, all of which had been published in the monthly report of the Committee on State and Local Bar Activities, and, after much discussion, Item No. 16 published in the June, 1936, Report and made by you to Mr. Shafroth on June 13, 1936, was voted the award.

You will recall that this item concerns the poll of lawyers of your county for judicial candidates. While many other bar associations have taken advisory votes on judicial candidates, you might be interested to know that the fact that the poll was taken only two days before the election so that none of the candidates could use the result in their campaign, and the apparent response on the part of the voters to the action of the Multnomah Association were the features which caused the committee to feel that this was indeed an activity of great benefit both to the bar and to the public.

I enclose herewith a letter from Mr. Gambrell enclosing check for $25.00 payable to your Association, and congratulate you and your associates on your good work. Very truly yours,

R. ALLAN STEPHENS.

Board of Governors Passes on Important Matters

BOTH the Board of Governors in office during the Fifty-Ninth Annual Meeting and the one which took office immediately after the meeting adjourned transacted important business. The first named Board took action on various matters as follows:

Directed further study of the Service Letter project, by a Special Committee;

Joined with the State Delegates in recommending unanimously to the Assembly that the reports filed by members of the Special Committee on Federal Legislation, etc., be received and filed, without action upon the language of either report;

Voted cooperation with the United States Sesqui-centennial Commission, in the observance of the 150th anniversary of the Constitution of the United States, and authorized a Special Committee for that purpose;

Voted to take an advisory part as to the legal aspects, without commitment, of the studies being conducted by the United States Senate Committee on Manufactures, as to the creation of a National Economic Council;

Approved Nation-wide essay contest for secondary schools, under the auspices of the Committee on American Citizenship;

Selected and announced as the subject for the 1937 contest for the Ross Essay

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Addresses at the Annual Meeting

In This Issue

PLEA FOR A HISTORY OF AMERICAN LAW

Back of Current and Recent American Law and Legal Science, the Names and Work of the Great Judges and Writers of Text Books, There Is a Vast Field of American Legal History, Stretching Over a Period of Two to Three Centuries, of Which Very Little Is Known, at Least in England, and Which Is of the Greatest Possible Interest*

By Sir Maurice Amos, K. B. E., K. C.
Quain Professor of Comparative Law, University College, London

Mr. President, and Gentlemen: I wish in the first place to express my warm and sincere appreciation of the great honour you have done me in inviting me to be the guest of your great association at this meeting. I think I may appropriately take it to be also a compliment to the University of London in which I hold a chair. But in so far as it is a personal honour, it is one of such a character that my grandchildren,—if they have any sense—will remember it to my credit.

Now gentlemen it has been said that gratitude is a lively sense of favour to come; and I am consequently going to make bold to follow up my personal thanks with a plea for further benefits. But I hasten to say that what I ask for is not for myself, but for my legal brethren in England. It sounds a simple request. It is this. We want to know more, much more about American legal history. We are not lacking in some measure of familiarity with current and recent American law and legal science. We know and quote your reports; we know your admirable students' Case books; the names of your great judges and writers of text-books are familiar to us; every student knows the work of Story, Holmes on the Common Law, Thayer's Preliminary Treatise on Evidence, Williston on Contract, Wigmore on Evidence. But back of all this there is a great field of American legal history, stretching over a period of some two to three centuries, of which very little is known, at any rate in England, in which research is extremely difficult, if not impossible on the other side of the Atlantic, and which is nevertheless of the greatest possible interest.

It is only recently, about fifty years ago, that the Selden Society was founded in England, for the editing and publishing of English legal records. And let me here pay tribute to the great contributions made to English legal history by American Scholars. This is not surprising, because until a century and a half ago, your legal history and ours was common ground. And it is not only in the published works of your eminent professors of law that treasures of legal research are to be found. I had occasion some years ago to study the subject of false imprisonment where the original confinement had taken place with the plaintiff's consent, and I found the most valuable collection of ancient authorities in a judgment of Judge Earl of the New York Court of Appeals.

The law of Scotland has hitherto not had a historian, although the law of Scotland offers a subject of the greatest interest; but only two years ago, largely under the inspiration of Lord Macmillan, there was founded the "Stair" Society, on the lines of the Selden Society, to promote the study of Scottish legal history. The Stair Society has already published a first volume, of the greatest interest.

Now I do not know if it is necessary for me to explain why American legal history appears to us to be so interesting.

The first edition of Blackstone's Commentaries was published in 1765; and I think I have the authority of Dean Pound for the statement that more copies of that first edition were sold in America than in England. And that fact appears to justify as a first very rough approximation, that at the time of the Declaration of Independence the Common Law of America was very close to the Common Law of England. Since that time the law has been profoundly modified on both sides of the Atlantic, partly by judicial decisions, but directly by statute. Now it is a very remarkable circumstance that while the changes both in England and in America have been very great, and have taken place independently of each other, yet they have run on very parallel lines. Now while it is easy to trace the history of legal evolution and of legal reform in England, it is very difficut, at least we Englishmen find it very difficult, to follow the similar and parallel lines of development in America.

Let me give an example. At the time that Blackstone wrote, our criminal code was ferocious

*Address delivered at the Fifth Session of the Assembly of the American Bar Association, at Boston, August 26.

in its character. All but the smallest thefts were felonies, and, unless the prisoner could claim benefit of clergy, were punishable by death. Blackstone states that there were nearly two hundred capital offenses. Today there are four. The process of humanization began early in the nineteenth century, under the influence of such men as Sir Samuel Romilly, Sir James MacKintosh, and Sir Robert Peel. We can point to the men and we can point to the statutes. But at the same time, a corresponding process was taking place over here, not in one, but in many jurisdictions. It would be of the greatest interest to know under what influences this humanitarian and rational process took place; what obstacles it had to encounter.

What happened about benefit of clergy? What happened about confiscation of goods—the common law penalty for felony? When Blackstone wrote a person under indictment for felony was not entitled to counsel; and if I remember rightly, he was not entitled to compulsory process for the production of witnesses. How and when was all this changed?

Let me take other examples, every one of which represents for English lawyers at any rate a large and enticing question mark.

By what processes, under the influence of what examples, was the common law of property in land so profoundly modified as it has been? We in England abolished the heir-at-law ten years ago. I believe that primogeniture was abolished in Virginia about 100 years ago, by a court decision based on the principle that primogeniture was incompatible with republican institutions. What happened in other states?

I have read that in Maryland it was held that the Statute of *Quia Emptores* was not in force, and that consequently subinfeudation, and the creation of new manors was possible. What happened next?

In some cases some of the States have preserved common law institutions relating to realty which we abolished long ago—for example courtesy and dower. What other examples are to be found of the survival of the law as expounded by Blackstone? Have any states preserved fines and recoveries, or the action of ejectment in the names of John Doe and Richard Roe?

Then let me take as another example the subject of chancery jurisdiction and equitable remedies. I have read that some states, animated by the feelings of Sir Edward Coke, refused to permit the creation of courts of chancery; nothing was to be permitted which threatened the purity and preëminence of the common law. Nevertheless, it is obvious that in those states it must have been possible to procure the setting aside of a deed which had been obtained by fraud. In other words the common law court must have provided equitable remedies. How did this come about? When? Where? How far did it go? Was it found necessary to have recourse to the legislature?

Then take civil procedure. Sir W. Holdsworth, in his History of English Law, gives an account of common law procedure as it flourished in England at the end of the 18th century which can only be described as a nightmare of perversity. Since that time of course in England the whole bad old system has been completely swept away, and replaced by the highly rationalistic and Benthamite system incorporated in the Rules of the Supreme Court, and in the County Court Rules. I know that in many of your states you have made a similar clean sweep. But I understand that in some or many jurisdictions you have retained, in name at any rate, common law pleading. It is very certain that this has little resemblance to the common law pleading described by Sir William Holdsworth. What happened? In what way, by what steps, under what influences, was the old procedure made tolerable without the clean sweep?

Then take the subject of the admission of the sworn testimony as witnesses of parties to suits. In the days of Blackstone, the idea of allowing a plaintiff or a defendant to enter the witness box would have been as shocking to a common lawyer as it would to a modern Frenchman or Italian. This reform was first introduced in England for the County Courts in the '40s of last century. I feel very confident that at the present day there is no jurisdiction in the United States where the testimony of parties is prohibited. I should not be surprised to learn that it came in here before it was introduced in England. But it would be deeply interesting and instructive to know the process by which the reform was brought about. Particularly as it is generally supposed that the writings of Jeremy Bentham never had any great influence in America. And no foreign country offered a model. So that if my conjecture is correct, there must have been a rationalistic wind blowing which was purely national.

Then take corporations. Until the nineteenth century there were in England few if any corporations which were not either corporations at Common Law, or corporations by charter. The corporation by act of parliament was, speaking very broadly, a product of the railway age, because the railways required compulsory powers, which a charter could not give. Now when, in the reign of Charles II, the first charter was given to the Carolinas, or at least to the proprietors or corporation of the Carolinas, they were invested into the regalian or quasi-royal prerogatives of the Bishop of Durham, who ruled over the palatinate of Durham. Now the Bishop of Durham had and exercised the power of creating corporations by charter. This immediately suggests the question whether the proprietors of the Carolinas exercised the same powers; whether the power of incorporating by charter was exercised in other colonies by the Royal Governors. I believe that the question was raised after the Revolution, in one State at any rate, and that the legislature successively maintained its exclusive prerogative to create legal persons. But are there, or have there been, any pre-revolutionary corporations created by charter, other than the colonial governments themselves? This is a large subject, because there are many possibilities.

I will take as my last example the subject of ecclesiastical courts. The ecclesiastical courts in England exercised a wide and important jurisdiction, not only in matrimonial matters, but in matters relating to probate of wills and administration of estates. And that jurisdiction is exercised today in England by the direct successor of the old ecclesiastical courts, the Probate and Divorce division of the High Court.

I believe that there were, strictly speaking, no ecclesiastical courts in America. In the first place, is that true? If it is true, what substitute was

created? I know something of the practical answer to that question; but I have been unable to discover the historical answer; and I am confident that the historical answer would be very interesting.

It would be unpardonable of me not to pay a tribute to the work of the Legal History Committee of the American Historical Association. The volume containing the records of the Chief Court of Maryland toward the year 1700 is of great interest, and it is rendered particularly valuable by the admirable introduction by Chief Judge Bond.

But I have no fear that the interest offered by the records of the old Colonial period will be overlooked. My plea relates to a later period in your legal history; let me put this as the period beginning about 1750, and lasting as long as there were new states being created. I recently had the good fortune to come across a book which was privately printed in 1870: Early Days in California, by Stephen Johnson Field. This was Mr. Justice Field of the Supreme Court of the United States, brother of Dudley Field and of Cyrus Field. Stephen Johnson Field went out to California as a very young lawyer, a year or two before '49, and became eventually one of the builders of that State, and the draftsman of her Codes. Those of you who are acquainted with that book will agree with me that it is a book of the greatest possible interest, both from the purely romantic and from the legal point of view. It has one great defect; it is too short. It excites more curiosity than it satisfies. Here was this highly cultivated young New Yorker putting up his shingle outside a tent on the site of what afterwards became the city of Sacramento. What laws did he apply? What laws did he help to make? What laws was he able effectively to enforce?

The honorable curiosity to which I am endeavoring to give expression is a many-headed monster; it demands to know what happened in every State, in every section of the country, over a period of about 120 to 150 years. But as it is an intellectual monster, it cannot be fed on an encyclopaedia of undigested fact. What my monster wants and indeed rampantly demands is a study of movements. I can imagine that the movements to be studied might be grouped into the humanitarian movement, touching capital offences and imprisonment for debt, and usury laws; a puritanical movement; a republican equalitarian movement; a purely rationalistic and common-sense movement. And I have little doubt that the historian of whom I dream would in the course of his exciting researches encounter not only movements but men, mute inglorious Hampdens, names now forgotten save perhaps by a street name or a statue in their own home town, who procured the passage of some law in their own legislature which was afterwards copied all over the country.

When I first visited the United States thirty years ago I was astonished at the splendor of the scenery, and I complained that no one had prepared me for such spectacles. I came to the conclusion that familiarity veiled the vision of Americans to their surroundings: nothing short of the Grand Canyon of the Colorado excited their attention. If I owe you an apology for venturing to direct your attention to your own history, my excuse must be that a foreigner may possibly see what the citizen cannot see—the interest of his own familiar surroundings. The interest of legal history does not depend upon the time it has taken to happen.

A MESSAGE FROM ACROSS THE BORDER

The Honorable Mr. Justice Davis of the Supreme Court of Canada Brings a Message of Good Will from the Canadian Bar Association and a Suggestion that before Long the Two Associations Have a Joint Annual Meeting to Renew Old Friendships and Pledge Themselves again to the Furtherance of the Great Purposes and Ideals of the Profession*

AFTER making appropriate reference to the complimentary words of introduction of President Ransom, Mr. Justice Davis continued:

I count it indeed a great honour as well as a very great responsibility to address such a gathering. I greeted you as I rose as "fellow members" of the American Bar Association and I am entitled to do so by virtue of the honorary membership you so graciously conferred upon me in Milwaukee two years ago. My visit of two years ago at your meeting at Milwaukee remains very fresh in my memory as an expression of kindness and hospitality —only equalled by the overwhelming hospitality of this week in Boston—and it is a great pleasure and satisfaction to be afforded an opportunity of renewing the pleasant contacts of two years ago.

May I at the very outset discharge myself of the public mission that has brought me here. I am not among you as a Judge of the Supreme Court of Canada, though I am not unconscious of the fact that your most cordial reception of me is in large measure a token of respect to the Court on which I chance to serve. I am here as the official representative of the Canadian Bar Association, and by that Association I am instructed to convey to you, Mr. President, and to your colleagues of the American Bar, our most cordial greetings and warmest wishes. I should like, if I may, to add to that message an expression of my own appreciation of the privilege which has fallen to my lot in being its

*Address made at a luncheon of the American Bar Association at Boston, on August 28.

bearer to you this afternoon. Your hospitable custom for years past to invite a representative from our Association to your Annual Meeting is a custom which I can assure you has been of great benefit to Canadian lawyers and I hope of some little benefit to your members. We lawyers meet together annually not for a discussion of the merest legal conundrums but because lawyers assume a creative function in the development of the law and endeavour not to lose sight of the social conditions which the law exists to regulate and in which it must work. We must never regard the old legal doctrines as necessarily the best in a changed and changing world. Law is indeed a science, one of the first and noblest of human sciences as Edmund Burke a century and a half ago said in his famous speech on taxation. But law is more than a science; it is an instrument for regulating the conduct of the affairs of life in a just and practical way.

The Canadian Bar Association is fully representative of the Bench and Bar of all parts of Canada and I am glad to say is doing a great national service in bringing together the lawyers from all parts of the country in a common effort for better understanding and mutual good will. The Canadian Bar Association is in very truth the child of this Association. Many of you will recall the memorable Annual Meeting of your Association that was held in the City of Montreal in the Province of Quebec in September, 1913. That was a memorable occasion. Your special guest was that great English lawyer, jurist, scholar and statesman, Lord Haldane, then Lord Chancellor of England, and the Keeper of that Great Seal under which alone supreme executive acts of the British Crown can be done. The late lamented King George V. graciously approved of the Lord Chancellor leaving British shores at that time for attendance at that meeting. Your President at that time was Frank B. Kellogg, who has since made such a singular contribution to the cause of peace and whose name will go down in history as a great representative of his peace-loving country. The official welcome to Canada was extended by the Right Honourable Sir Robert Borden (as he now is), then the Prime Minister of Canada, who was so soon thereafter to bear the heavy burden of being the only Prime Minister who carried on his high office during the full four years of the Great War.

What men of law and statesmanship they were! It was that meeting of your Association in Montreal in 1913 that directly led to the formation of the Canadian Bar Association.

Now then at this luncheon today may I presume to offer the suggestion that before long we should have a joint annual meeting and at that time renew our friendships and re-pledge our efforts to a furtherance of those great purposes and ideals which move us as lawyers and then and there celebrate our unity in the faith and brotherhood of the law by gathering together in a great joint assembly at some central and convenient place. (Applause) We are all of the same kith and kin, the same race and blood, schooled in the same studies, practicing the same pre-eminent profession, committed to the same spirit and purpose, united and bound together in the high and noble task of executing justice and maintaining truth. In the belief that it is the elements which connect us and not the elements that divide us which are strongest and most permanent, I leave this suggestion for the consideration of the Executives of the two Associations.

There are those who regard any reference at a noon-day luncheon to the international boundary line as a hackneyed subject. I deprecate that thought. That boundary line is unequalled historically in the history of the world and is the most real and significant fact on this continent. For some 5,500 miles it separates flag from flag, nation from nation, sovereignty from sovereignty. We are two separate and distinct nations and I venture to think we shall so remain. No one, so far as I am aware, advocates or contemplates anything in the nature of a political alliance. But the things in which we differ are purely political: the things in which we are alike are as deep rooted as life itself. One in a thousand years of historic background, with a common language, a common literature, a common law, common ideals of law and liberty, a common belief and confidence in responsible government, a common love of freedom of thought and of action and of the Press, and a common faith in one God and Father of us all.

What an example to the world! Europe dotted with a network of boundary lines, only increasing points of friction, misunderstanding and grave dangers. We unmindful of our boundary line and really indifferent to it. Suspicious nationalism and hysterical experimentation are stalking through Europe like a pestilence. On this continent, nothing obscures the essential friendship of the American and Canadian peoples. Confidence, understanding, good will, security, prevail and abound. May I recall the greeting that the British troops, on the first Christmas Day of their co-operation in the field, sent to their American comrades in arms: "We welcome you as brothers in the struggle to make sure that the world shall be ruled by the force of law and not by the law of force." That message and that vision still have a practical application in this day and generation. And was it not the same thought that prompted your great Abraham Lincoln to wisely admonish the people, with the words: "Let reverence of the law become the political religion of the nation."

The relations between Canada and the United States have issued in the staunchest of international friendships. Such a friendship is one of the greatest reconciling ministries of this period of the world's history. The actual fact of our international relations is the greatest contribution this continent has made to world neighbourliness. Is it not truly the appointed design and opportunity of our great peoples to march together in emancipating bonds of intimate friendship?

May we not fervently hope that all things between us may at all times be so ordered and settled upon the best and surest foundations that peace and happiness, truth and justice, religion and piety, may be established among us for all generations?

THE BENCH AND BAR OF IRELAND IN THE NINETEENTH CENTURY

Some of the Judges and Clever Lawyers and Successful Advocates Who, by Their Personality and Qualities, Were and Have Remained Outstanding in the National Life—In the Period under Review the Irish Bench and Bar Were Peculiarly Rich in Talent—Four Oustanding Figures in the Four Courts at Beginning of Century—Other Noted Names*

By The Honorable Mr. Justice Hanna
Judge of the High Court of the Irish Free State

THIS is not a survey of all the good judges or clever lawyers or successful advocates who have adorned the profession in Ireland during the 19th Century. It is mainly of those who, by their personality and qualities, were and have become outstanding in the national life. Good judges and clever advocates are the same everywhere and we have plenty of them. Outside their profession they are very often what are called "dull dogs." In the period under review the Irish Bench and Bar were peculiarly rich in talent. The incomes at the Bar were probably larger than at any subsequent time and the profession contained an unusually large number of men of brilliant intellect and eminently independent character. But while this is true, some, both of the Bench and Bar, indulged in extravagant language and conduct and cultivated eccentricity, while the judges often permitted counsel great latitude in treating witnesses and even the Court with witty insolence and bullying. Of the Judges it may be said that in every period throughout that century office for the legal profession was the reward or prize of some political service. In the opening days of the century, so untrammelled were they by any sense of the dignity of their position or profession, that duels were very frequent. Lord Clare fought a duel with Curran and, it is said, tried to kill him. Baron Metge of the Exchequer fought three duels with individuals who had annoyed him. Lord Norbury fought "Fighting Fitzgerald." Lord Clonmell, the Lord Chief Justice, fought the Earl of Llandaff. Doyle, a Master in Chancery, fought a duel with the Provost of Trinity College and many others.

Had one gone into the Four Courts in the beginning of the 19th Century there were four outstanding figures, famous or infamous, according to the point of view—Lord Clare, the Lord Chancellor Lord Norbury, the Lord Chief Justice; and, practising before them, O'Connell and Curran.

Lord Clare who as John Fitzgibbon had been appointed Lord Chancellor in 1789 and afterwards given an earldom in 1796, became a Peer of Great Britain in 1800 and died in 1802. He was the son of an Irish Barrister. A greatly hated politician, he has been called the Father of the Union. He exercised an influence in Irish political and legal life without parallel in the case of a Lord Chancellor of Ireland. Of great ability, he was a man of dominating force of character, full of courage, self-reliance, but overbearing, narrow, ungenerous and, with many, exceedingly unpopular. His duel with Curran arose out of the debate in the Irish Parliament in which offensive terms were used on both sides.

Though they had once been intimate friends and Fitzgibbon had given Curran his first Brief Bag, they met, as I have said in a duel where Fitzgibbon fired in deadly earnest. His vindictive feeling towards Curran was such that when he was elevated to the Bench he never lost an opportunity in his own Court of slighting Curran as an advocate. He drove Curran out of the Chancery Courts in which, in Lord Lifford's time, Curran had an extensive practice and during the twelve years that Lord Clare held the Great Seal, Curran estimated he had lost at least £30,000 through his disfavour with the Lord Chancellor. Even when Clare was Lord Chancellor he used such language in Court that the victim challenged him to a duel but Clare declined. He had changed his politics because before he was appointed Attorney-General he had floated with the rising tide of public opinion in favour of the independence of Ireland and had been associated with the movement of the Irish Volunteers. Some of their leaders were suspicious of him at the time but Grattan, who believed in him, recommended him as Attorney-General to the Lord Lieutenant. Afterwards Grattan bitterly regretted this and said "I pressed for the appointment of Fitzgibbon but I have that sin to answer for. His country and myself have been the peculiar objects of his calumny." While at the Bar Fitzgibbon was very successful and he has left on record that in the last five-and-a-half years of his practice he made £36,999. 3. 11. He made no great contribution to Law, but he was, in the opinion of some writers, possessed of all the essentials of a great Judge. But it was admitted that he was at his best as an interpreter of the law and as administrator of the Legal Departments of the State. When, after the Union, he went to the English House of Lords, his insolence and dominating manner made him ill-received and he returned to Ireland embittered and is reported to have said "I who once had Ireland at my disposal could not now appoint a gauger." His funeral was the occasion of a very hostile display

*Address delivered at the Fifth Session of the Assembly of the American Bar Association, in Boston, on August 26.

in Dublin, the hearse being pelted with filth as it passed through the streets—Sic transit gloria.

Lord Norbury was Lord Chief Justice during part of the time that Clare was Lord Chancellor. He was an outstanding figure by reason of his remarkable characteristics. In 1800, as John Toler, he was appointed Chief Justice of the Common Pleas, with a Peerage and he held the position until 1827. He had a shrewd mind but was reputed to be destitute of all knowledge of Law and incapable of comprehending any legal principles. His success at the Bar had been due entirely to his being endowed with the lungs of a Stentor, and to a turbulent, dauntless temperament, in days when noise and bluster made for success before a Jury. In the House of Commons he was remarkable for his commonplace vituperation which was used by the Government to reply to the polished oratory of Curran, Plunkett and Bushe. On the Bench his whole aspect and bearing was that of the same turbulent spirit of domination and terror, together with the consciousness of unbounded power which he used unmercifully towards witnesses and others, added to a liking for buffoonery. He was such a comedian on the Bench, that the galleries of his Court were crowded and in those days Counsel like O'Connell, Gould and Grady were such matches to his wit that in his Court there seemed to be a rivalry in uproar.

It is a true story that when a witness said that his occupation was that of keeping a racquet Court, Norbury said "So do I." He was notorious as a Plaintiff's Judge because during the greater part of his career the fees from litigants formed a considerable portion of the judicial income and his object was to attract suitors to his Court. His Registrar kept two bags under his seat in Court, one for the silver fees for the Judge and the other for his own pickings. When fees were abolished the business in his Court visibly declined. He was a very mean man. To supply the deficiency of horse hair in his chairs in his study, he used to stuff them with all sorts of papers. These chairs were subsequently sold and in the seat of one of them was found by the Purchaser a letter from the Attorney General, Saurin, to Norbury who was going on Circuit, of a most improper character as to what he should do with reference to certain individuals he would meet on Circuit. In the end O'Connell presented a Petition that he should be removed for incompetence and after this, Norbury retired and was succeeded by Lord Plunkett. His cruel temperament is shown in the incident where a prisoner whom he had condemned to be executed on the 19th June asked (as was the custom at the time) for "a long day," meaning that his execution should be postponed for a considerable time. Norbury's answer was "I will give you your wish, you will be hanged tomorrow, it is the longest day in the year."

This is a point to touch upon an Irish Grievance. For generations the Irish Bar had suffered the indignity of the judicial appointments in Ireland being given to members of the English Bar. On the death of Lord Clare, an English Equity lawyer, Lord Redesdale was appointed Lord Chancellor, and from his appointment in 1802 until 1841, when Lord Campbell was appointed, with the exception of a very short period the office of Lord Chancellor was held in succession by the English lawyers, Lord Manners, Lord Sugden and Lord Campbell. Lord Redesdale, known as John Mitford, was undoubtedly a very distinguished English Chancery lawyer who had been in the front rank of the Equity Bar. He had held a Welsh Judgeship; had been Solicitor-General and Attorney General in England and Speaker of the House of Commons, but as a piece of political jobbery the Chief Secretary of Ireland, Abbott, desired to become speaker of the House, and the Government placed the high post of Lord Chancellor in Ireland in the hands of Mitford. He held his position until 1806 and was not unfavourably considered by the Irish people as he had made a great struggle when in Parliament against the penal laws. As a great lawyer his tenure of office for the four years certainly gave an impetus to legal learning in Ireland. A young Barrister named Lefroy, who, half a century later, was to become Lord Chief Justice of Ireland, followed his judgments with great care, and they are contained in the well-known Reports of Schoales and Lefroy, where the deep knowledge and learning of the Lord Chancellor in both law and equity is displayed.

After a short interval in which George Pontonby was Lord Chancellor, the Great Seal of Ireland was given to Lord Manners who had been a Baron of the Exchequer in England and a strong Protestant partizan. In appearance he was described as the phantom of Charles II. on account of his stature, features and fine courtly manner. Sheil said of him that he had a face like a manuscript Juvenal found in the ashy libraries of Herculaneum. His Judgments, which are reported in Ball and Beatty's Reports, are not considered of much weight. O'Connell said of him that while he was a bad lawyer he was the most sensible looking man he had ever heard talking nonsense.

The next English Lord Chancellor was Sir Edward Sugden, appointed in 1834. He was the son of a barber and, with a liking for Law, he had become a conveyancer's clerk before he went to the Bar. His fame is undoubted as a great Real Property lawyer and his tenure of the Irish Seal showed he possessed judicial powers of a high degree of excellence. With a short interval he held the position until 1841. When he was appointed in 1834 O'Connell remembered that Sugden who had successfully protested against the appointment of an Irishman, Lord Plunkett, as Master of the Rolls in England, was now accepting the Seals in Ireland and he said:

"What! Will the Bar of Ireland tamely submit to this fresh insult? Are there no able men to be found at the Irish Bar that we must have an English barrister sent amongst us?"

It is of Sugden that the story is told that on one occasion when he was pleading before Lord Brougham, the English Lord Chancellor, he protested that the Lord Chancellor was writing letters and not favouring him with his attention. Brougham replied—"I am only signing papers of mere form. You may as well say I could not listen to you when I was taking snuff." The enmity between Brougham and Sugden was due to the fact that the former, as Lord Chancellor, had set himself to radically reform the Chancery Administration and practice to which Sugden was so closely connected. Sugden's Irish Judgments are reported in Drury and Warren's Reports. It was he who issued the Proclamation which was the basis of the prosecution of O'Connell which ended in his subsequent trial and conviction. The conviction was reversed in the

House of Lords, on which occasion Lord Denman used the famous phrase as to the system of packing juries in Ireland—"If this is to be trial by jury, trial by jury becomes a mockery, a delusion and a snare."

Lord Campbell, or, as he was known at the time, Jock Campbell, was the last Englishman to whom the Lord Chancellorship of Ireland was given. It was a piece of most barefaced jobbery. Lord Plunkett, who had been for a short time Lord Chancellor, was dismissed from that position to make room for him and when Campbell came to Dublin he stayed only for a few weeks and sat in Court four days and then retired to the House of Lords in England where he was entitled to a life pension of £4,000 a year, which his friends said he did not apply for. His retirement to the English House of Lords gave him an opportunity of writing his "Lives of the Lord Chancellors," which, as Sir Charles Wetherell said, "added a new terror to death." After Campbell's appointment the Irish Bar passed a resolution that as all judicial appointments in England were made from the English Bar so all judicial appointments in Ireland ought to be made from the Irish Bar and thereafter that was adhered to.

We come now to consider in succession two very distinguished Irishmen—Plunkett and Bushe. Most people agree that Lord Plunkett was the outstanding Irish Lord Chancellor in the early part of the century. He was the son of a Presbyterian Minister in Ulster and during his political life, which was very strenuous, he had opposed the Union with courage, resolution and eloquence, and was a strong supporter of all the Acts for the liberty of the people and especially for the emancipation of his Catholic fellow-countrymen, whose gratitude he earned by his untiring devotion to their cause. His reputation as an orator was more in the Senate than in the Halls of Justice. For twenty years he practised only in the Court of Chancery and it was said that he had no knowledge of Case law but seemed to delight in dialectics with the judge more than in the establishment of his client's case. In the Courts of Law the matchless force of his eloquence was heard in some of the great trials such as that of the Brothers Sheares for whom he appeared. His promotion had a varied course. In 1812 he was recommended for the Lord Chancellorship of Ireland, to succeed Lord Manners, but the King declined to sanction his appointment on account of his being a champion of the Catholic cause. Some time later he was appointed Master of the Rolls in England in succession to Sir John Copley, afterwards Lord Lyndhurst, and received a Peerage; but as the English Bar made a public protest against his appointment, he resigned in a few days and later was given the Lord Chief Justiceship of the Common Pleas in Ireland, which he held until 1830, when he became Lord Chancellor of Ireland, a position which he held until 1841. At that time efforts were made to obtain his resignation as it was alleged that his judicial powers had failed and that his decisions were constantly reversed in the House of Lords, as Clark and Finnelly's Reports show. His son was made a bishop at this time to induce him to resign but it was of no avail until a personal appeal was made to him by some of his friends. Despite his eloquence and personality he was never a judge of first rank, as he administered a kind of moral equity rather than the formulated jurisprudence to which he was bound to give effect. In his ten years as Lord Chancellor there were thirty-nine appeals from him and of these he was reversed by the House of Lords in twenty.

The name of Charles Kendal Bushe is always mentioned where Plunkett is discussed, as he was one of the most brilliant of the brilliant lawyers of his time. He was born in 1767 and educated at Ballytore where Edmund Burke received his first education. While at the Bar one of his most famous cases was the defense of Chief Baron O'Grady who, claiming to have the right of patronage over the Exchequer Division, appointed his own son Registrar. This was impeached by the Crown who claimed the patronage and eventually succeeded. For some years Bushe expected to replace Chief Justice Downes but the latter was so dilatory in retiring that Bushe on one occasion said that the Chief Justice had "every virtue except resignation." However, in 1822, Downes proved he had that virtue and Bushe received the promotion.

Lord Brougham paid Bushe a high tribute on his elevation. He wrote of Bushe that "his merit as Speaker was of the highest description, his power of narrative has not perhaps been equalled. No breath of calumny has ever tarnished the beauty of his judicial character during the twenty years that he presided on the Bench. He was stern in his administration of the Criminal Law but he was rigidly impartial as he was severe." Samuel Lover, the novelist, in "Jack Hinton," describes Bushe as "the Cicero of his Nation." There was an extraordinary incident in his career as Junior Barrister when defending a prisoner at Waterford Assizes for the murder of one Walter Meylor, who was alleged to have been killed by a party of rebels and his body found near the sea-shore wrapped in a coat of the same texture as that worn by the deceased. Bushe neither cross-examined witnesses, called witnesses nor addressed the jury further than to say "Gentlemen, do you know Walter Meylor?" and the jury answered "Yes." He then called Walter Meylor and the alleged deceased came walking into the Court, the explanation being that about the time that he was thought to have been murdered he had fled to America for some reason of his own.

In the middle of the century there were several holders of high judicial office in Ireland, who in retrospect of the life of the country and the law did not stand out particularly prominently though of importance in their own days. They were all political appointments as rewards for political services either in Parliament or as Law Officers. Lefroy was made Chief Justice at the age of seventy-six in 1852 though he had been a Baron of the Exchequer Court from 1841. He was an astute and learned lawyer. He held the office of Chief Justice until he was ninety-one years of age and against both him and Lord Blackburne who was eighty-four and had been Master of the Rolls, Lord Chief Justice and Lord Chancellor, allegations of unfitness were made in Parliament and an Address to the Crown for their removal threatened. When they resigned Whiteside succeeded Lefroy.

I pass over as being distinguished lawyers and advocates of their own day such men as Pigott; Christian, who opposed the fusing of Law and

Equity; and Monahan, but something must be said about the two Fitzgeralds—appointments by Lord Palmerston.

Francis Alexander Fitzgerald was a Baron of the Exchequer and father-in-law of the distinguished Lord Justice Fitzgibbon and grandfather of Mr. Justice Fitzgibbon of our present Supreme Court. John D. Fitzgerald was appointed Justice of the Queens' Bench in 1860, but his reputation for judicial qualities and learning of the highest order was such that he had the unique honour of being elevated in 1882 straight from the Irish Puisne Bench to the House of Lords as a Lord of Appeal. In 1885 he was offered the Lord Chancellorship of Ireland and refused it.

Michael Morris, a Catholic Tory, who was appointed a Chief Justice of the Common Pleas in 1867 and Lord Chief Justice in 1870, has a great reputation for his rude Irish wit and great personality but had a very meagre reputation as a lawyer. He was usually described as "a jolly good fellow." With a strong Irish brogue, he prided himself on being extravagantly Irish, as it was understood fifty years ago. He had an ostentatious contempt for law and regarded the Law Reports as impudent attacks on common sense but with it all he was a clever man, with a wonderful grasp of facts which was shown when it became his duty to address a jury. He was unpopular with the Bar, being discourteous to Counsel, regularly reading a paper during their addresses to the jury. Notwithstanding all this, he was appointed a Lord of Appeal in 1887 and raised to the Peerage.

Christopher Palles, the last and greatest of the Chief Barons, came on the Bench in 1874 and retired from that position in 1916 having been forty-two years on the Bench and having gained for himself, without doubt, a reputation as the greatest Irish Judge of the century. He had never been in Parliament and owed his appointment and his fame entirely to his unequalled legal talents. His intellectual pre-eminence, his marvellous mastery of the science of our law, and his permanent contributions to legal principles as contained in our Reports; his force of character and integrity, will all cause him to be remembered as one of our greatest lawyers and judges of all time. A predominating feature of his judicial character was his deep regard for the liberty of the subject and his intolerance of the oppression of the individual either from a combination of his fellows or by a Department of State. On the Bench, he believed above all in the inflexible application of the Law. He had no lighter side to his character, having neither wit nor humour.

Another modern name that is well known is that of Lord Justice Fitzgibbon. Without having been in Parliament he was at the early age of 40 appointed a Lord Justice of Appeal, a position which he adorned for thirty-one years. He was always courteous and had the rare gift of pleasing and easy eloquence, to which he added the power of expounding clearly, complicated facts of the most intricate branches of Law. Further he was a great citizen and was very prominent in the public life of the country, apart from politics, for his administrative business capacity rendered him invaluable to his Church and to the several educational and other institutions with which he was associated. He was a member of both the Irish and the English Privy Councils and became a Bencher of Lincoln's Inn. It is said that he would have been promoted to the House of Lords had it not been that he was an intimate friend of Randolph Churchill who was at that time (when Morris was translated) out of favour with the high political authorities in England.

Edward Gibson, afterwards Lord Ashbourne, held the office of Lord Chancellor, with short intervals, from 1885 to 1905. He was not only Lord Chancellor of Ireland but was given a seat in the Cabinet. He was a great politician and a determined opponent of Gladstone's Irish Policy. He was not a great lawyer or a Judge but he was eloquent, always extremely courteous, handsome and dignified. As was said, he was wise and looked it.

We end the Judges of the century with Lord O'Brien, known to the Irish peasant as "Peter the Packer" on account of the allegations against him that he packed the Juries that tried those who were accused of political offences, when he was Crown Prosecutor. He was Lord Chief Justice for twenty-four years from 1889 to 1913 and elevated to the Peerage in 1900 with the title of Lord O'Brien of Kilfenora. It has been said in England that no one with the name "Peter" ever attained fame but Lord O'Brien belies that statement. He had rendered no Parliamentary service and he earned his promotion by his efforts as Law Officer in the restoration of order during the troubled period of the land agitation during which much abuse was heaped upon him, but his good humour and courage were proofs against it all. He was to the end of his career very popular with the Bar. He had a striking personality. He never posed as a great lawyer but when a case had been argued before him he could, in his Judgment, state the exact point with great clarity and sense. He had been a successful cross-examiner at the Bar, and even on the Bench he was inclined to display this quality. He had a very astute mind, much sagacity and knowledge of the world and an intimate acquaintance with the Irish character.

The Bar of the nineteenth century may be divided into two classes—the Chancery Lawyer arguing abstruse points of law with (as Hamlet says) "his quiddities, his quillets, his cases, his tenures and his tricks." He has had his day and is forgotten. We have then the advocate who lives his life in the eye and memory of the public. In this century, especially in the earlier part, we find that save with a few of the more turbulent and noisy class, the Irish Bar studied the ars loquendi, including manner, gesture and pronunciation. They did not think it amiss to attend to the elocution of the greatest actors and parliamentary orators. So much was this so, that in the Parliament House in College Green, accommodation was set apart for the students of the Bar. The oratory of those days was classical as compared with the vernacular oratory of today. It is difficult to study their oratory now, as most of us are devoid of historical imagination and the printed oratory of dead men is dull. But nevertheless the evolution of our national idea owes much to those orators who expressed the warm thought of the time and shaped the course of national development.

Burke's speeches were brilliant pamphlets delivered in the Senate; but when O'Connell outside the Bar entranced crowds of tens of thousands, his voice floated over them like the wind upon the

barley, and his oratory led the Irish Catholics from slavery to manhood. Like Hitler and Mussolini, he lifted his nation from pessimism to optimism. But more than oratory, these great Barristers, to whom I shall refer, had wit—a gift that has been lost by the Irish Bar in modern days. It is natural that the glamour surrounding O'Connell's public life as a politician should conceal from us his supreme merits as an advocate in the Courts. He was the most popular Counsel of his time. He never had silk, as he was passed over when the higher ranks of the profession were opened to Catholics after the Catholic Emancipation Act. He sought no promotion, for he refused the position of Chief Baron when it was offered to him in 1838 on the death of Chief Baron Joy. But he will ever live in the memory of his race. He was a shrewd, subtle and successful cross-examiner, and a skilful dissector of evidence. But when the subject of his case touched upon (as most of his cases did) political considerations he would lash himself into a fury and, with transcendent talent, pour forth his fervid periods to the jury. The view of his contemporaries was that when engaged in ordinary everyday cases he was both discreet and dexterous, while where humour was useful his fun was inexhaustible. But undoubtedly his real forum was the Irish public meeting where his stately presence and voice (unequalled in melody and compass) revealed him as a star of the first magnitude. Many are familiar with Bulwer Lytton's description of O'Connell's oratory—one of the finest descriptions of oratory in the English language:—

"Beneath his feet the human ocean lay
And wave on wave flowed into space away.
Methought, no clarion could have sent its sound
Even to the centre of the hosts around;
But as I thought, rose the sonorous swell
As from some church tower swings the silver bell,
Aloft and clear from airy tide to tide,
It glided easy as a bird might glide;
To the last verge of the vast audience sent
It played on each wild passions as it went,
Now stirs the uproar, now the murmurs stilled,
And sobs and laughter answered as he willed.
Then did I know what spells of infinite choice
To rouse or lull has the sweet human voice."

Let us turn to his contemporary, John Philpot Curran, who shared with O'Connell the distinction of being the most renowned members of the Bar. His speeches have been preserved and their perusal shows how great a master he was of classical oratory. In 1806 he was induced to become Master of the Rolls, a post for which he was very unsuited, involving an unaccustomed labor and restraint to which his life-habits at the common law side did not easily submit. But he, like O'Connell, had taken a large part in the history of his country and for that he is remembered perhaps by the public more than for his great position at the Bar. He himself always considered his Bar speeches superior to those on political subjects. His strong political views had brought upon him the bitter hatred of Lord Clonmell and Lord Clare, before both of whom he practiced. Contemporaneous with him at the English Bar was a great forensic rival, Erskine. But it has been said in comparison of them that when Erskine pleaded he stood in the midst of a secure nation and pleaded like a priest in the temple of justice, while Curran pleaded when Society was falling in fragments around him, when rebellion was in arms, not on the floor of a shrine but on a scaffold. The Irish Bar know that they owe to Curran the protection of many privileges, encroachments upon which by the judiciary he opposed with dignified courage. During the thirty-two years of his professional career he secured and maintained the affection and respect of all his colleagues, even of those who envied him his fame. In an age of corruption he withstood at critical periods munificent offers pressed upon him, and in the end accepted the Mastership of the Rolls grudgingly, and said it was like being stuck in a window.

I have a great admiration for Isaac Butt, another of our outstanding advocates of the Nineteenth century. He was born in 1813, the son of the Rector of Enniskillen. He lived through all the turmoil of the century. He attained fame both in politics and at the Bar. He was the founder of the Home Rule movement, though not of the phrase "Home Rule," which was first used by Mr. Galbraith, a Fellow of Trinity College, Dublin. He was Professor of Political Economy in Trinity College and for many years was popularly known as "Professor Butt." Politically he was at first a Conservative and opposed to O'Connell, and in the British Parliament represented Harwich for many years until, in the General Election of 1852, he was elected as a Liberal member for Youghal. It is recorded that O'Connell once said of him in the earlier days that though he opposed him then he would some day lead O'Connell's movement. At the Bar Butt had great distinction as a Junior—so much so that after being six years at the Bar Sir Edward Sugden, the Lord Chancellor (who was not predisposed toward Irish Barristers or inclined to compliment them) called him to the Inner Bar in 1844. He was Counsel in many great cases and defended Smith O'Brien in the State Trials of 1848. He then left the Bar for politics, until 1862 when he suddenly returned to the Four Courts and, strange to say, rapidly gathered together his great practice. He was, in the State Trials of 1865, what Curran was in 1798. He was a profuse writer and his great work on the Irish Land Acts (written in 1870) is a marvelous work, written, as it was, under distressing circumstances of financial embarrassment and almost poverty. If he had stood by the Bar he might have attained any position, but he was wayward, extravagant, unreliable and lived hard.

Lord Chief Baron Palles told me that on one occasion when he was Junior to Butt, in a case in the Vice-Chancellor's Court, Butt, who was to open it, just arrived a short time before the opening of the Courts from London in a most dilapidated condition, and during the argument was frequently supplied by the Chief Baron himself with champagne in a tumbler brought from the adjoining hotel. An old Solicitor, Mr. Nielsen, who recently died at the age of ninety-four, told a similar story of him. Butt was his Counsel in a case and Nielsen, giving him a lunch, ordered a bottle of champagne which Butt drank. Nielsen said "You should make a good speech on that," to which Butt replied "I would make a better speech on two." Nielsen got him another which Butt consumed. The Chief

Baron told me that his powers of advocacy in the presentation of facts were marvelous. The cases by which he is most readily remembered are that in which he obtained a verdict of £270 against Lord Lifford for saying "No" to his own Chaplain, and his defence of Barry, the Editor, who was brought before the Court for an article in his paper attacking Judge James O'Brien's conduct in a certain case. It was in the latter that Butt used to Judge Keogh the phrase so familiar now to lawyers, "Your lordship's order will go forth without authority and come back without respect." When Judge Keogh reproved him for his attitude towards the Court he cited the line from King Lear, "Be Kent unmannerly when Lear is mad." He had great nobility of character, but he lacked something. His political life was a failure. His professional career was a failure, because he would not do what he might have done. He was offered high judicial offices, including the Lord Justiceship of Appeal and the Lord Chief Justiceship of Ireland, but he refused these on the ground of principle, though he was in poor circumstances at the time. Those who knew him and have spoken to him have testified to me of his bright wit, his genial manners and his lovable nature. In appearance he was tall, with a wealth of snow-white hair, broad forehead, a pleasing face and dark eyes of dazzling brilliancy. His practice in speaking was to open a small penknife and, holding the blade, twirl it continually round and round.

Between Butt and Mr. Timothy Healy comes Seymour Bushe, a grandson of the Chief Justice. In my opinion he was the last of the classical orators that graced the Irish Bar and he had a true Irish wit. At the Bar he had a large jury practice where his eloquence made him a great verdict-getter, but he became a hypochondriac and took up practice at the parliamentary Bar in England, returning to Ireland only occasionally to discharge his duties as Crown Prosecutor at the Irish Old Bailey—Green Street Courthouse. I remember his beautiful voice and his polished periods. The best description of him was given by the last of our wits, Mr. Patrick Kelly, of whom I shall say a few words later. He had to reply to Bushe in an action and told the jury that when Mr. Bushe had a bad case he reminded him of a conjurer at the corner of the village street who would swallow a piece of brown paper and then produce from his mouth yards and yards of variegated ribbon. In the end he became a nervous wreck and died in obscurity in London. Tim Healy said of him that if he had gone to the House of Commons he would have been second only to Sheridan as orator.

The political life of Mr. Tim Healy is well-known to you all. Of that I shall say nothing but speak of him only as a barrister. As a lawyer he was, in my view, unequalled in his knowledge of Constitutional Law, the Land Laws of Ireland (a very complicated subject) and, of what used to be called, Crown Office Law, dealing with Certiorari, Habeas Corpus and Mandamus. He was, of course, in cases involving other branches of law, and from my association with him in such I can say that while he professed no knowledge of case law, he had great readiness in grasping legal principles of any kind and applying them to facts. As an advocate he was very eloquent, full of emotion (with which by his personal magnetism he could infect everyone) and an apt phrase-maker, often covering his adversaries and their theories with confusion by an appropriate remark. He was very witty and, though personally an extremely kindly man, could give a bitter stab. Most of the stories of his ready repartee have been repeated often, but I remember some that have not been published.

In the House of Lords in a case in which he was associated with me he said that one of the presiding judges had made "the pyramid of law to spin upon its apex," and in the same case he greatly amused that eminent equity lawyer, Lord Parker, by referring to the necromancy of conveyancers. It was he who, when some one described a man who had been very famous as an extinct volcano, replied "No, he is an extinct fusee."

In the Bishop Divorce Case, when his opponent, Mr. James Campbell (afterwards Lord Chancellor) had been overcome with his own emotion and gave way to tears before the Jury, Healy described it as "the greatest miracle since Moses struck the rock." When the Cork Courthouse went on fire on a Good Friday while the Court was sitting, he is reported to have said that it was because no judge had sat on Good Friday since the days of Pontius Pilate. On another occasion, when he was arguing before a Court presided over by Baron Dowse, on the morning of the second day he proceeded to cite a number of cases. The Baron said to him—"You must have spent the night with your law books," and Healy's ready reply was, in the words of Blackstone, "The lady of the Common Law likes to lie alone." He could be very scathing. There was a member of the Bar who had a very hoarse, heavy voice and seldom appeared in the Law Library unless there was some job vacant for which he was an aspirant. One day while Healy was sitting in the Library he heard the voice of this man as the latter was coming up the stairs and he said to his companion, "Who is dead; I hear the banshee."

There are two members of the Bar of more modern times who, while not great advocates, showed a true Irish wit and humor. These were Richard Adams and Patrick Kelly. Adams came to the Bar in 1873. He had been a journalist attached to the "Cork Examiner" and the "Freeman's Journal." He was by far the most amusing and witty man of his time, not only witty but also a humorist. It was said that when he became County Court Judge in 1894 for the County of Limerick the local comedy theatre closed down. On one occasion he was before the Committee of the House of Lords in support of a local Railway Bill. The Chairman (an English Peer) asked him whether the promoters had held a Wharncliffe Meeting. Adams had never heard of such a meeting and did not know what it meant, but he boldly faced the situation and asked the Chairman, "What did your lordship say?" to which the reply was, "I asked you did you hold the Wharncliffe Meeting." And the ready answer came—"Oh no—the County of Clare is proclaimed under the Coercion Acts and no meeting could be held." The Peer was quite satisfied and seemed to think that the Irish Coercion Act would not allow the ordinary statutory meeting of shareholders. He once described a great temperance reformer who was an unattractive man as "looking as if he had four fathoms of bilge water in his hold."

When the names of the Judges who were investigating the accusation against Parnell and the

Pigott Forgeries were made known, Adams, who had sat with Judge Day on the Belfast Riots Commission, wrote a letter to Lord Morley in which he described Judge Day as a Torquemada and unfit to sit. Morley read this letter in the House of Commons and there was a great scene as a result of which the name of the writer had to be divulged. This affected Adams mentally but when he recovered and Morley became Irish Secretary in 1892 he made Adams a County Court Judge. On one occasion it is said that his wife wished to go with him to London when Morley had become Chief Secretary. Adams said that was impossible as he was going to Morley's Hotel—a well-known hotel in London but that ladies were not admitted. His wife replied "Let us go to another hotel" but he satisfied her by the protest "Surely you would not forsake John Morley's hotel"—which of course had nothing to do with John Morley. He had a great dislike of Lord O'Brien. Once when the Lord Justice had refused an Application in which Adams was engaged, he came back to the Library and said that the new Oxford Dictionary would contain about 120,000 words of English but that Peter's Vocabulary was confined to about 500.

Mr. Patrick Kelly was a man with an extremely well-informed mind, full of culture and ready Irish wit. He never was a great success at the Bar though he had given much promise as a student. His wit was mostly expressed in picturesque metaphors such as his description of Bushe's eloquence. In reference to another well-known incident at the Irish Bar, he made an answer that is well-remembered. A lady brought an action for breach of promise of marriage against Chevalier Bergin. She appeared in the witness-box with some sort of veil or wrapping around her head and neck. The Judge was unable to hear what she said and asked her to remove it. To which Tim Healy added "Please remove your yashmac." Mr. Kelly, after repeating this, on one occasion, said "and when she had discocooned herself, I declare to God she was like Muckross Abbey when the Board of Works had stripped the ivy off it."

Thus I have given you a rapid survey of the Bench and Bar of an important century. That tradition of eloquence and wit has been broken and these gifts are seldom shown by the Bar and never by the Bench.

Perhaps it is that the Bar has been "cribbed, cabined and confined by the businesslike attention of the modern juryman who, finding his duty irksome, desires to know the facts and cut the cackle"; while the Judges are even more disinclined to bear a deluge of irrelevancies, though couched in apt and gracious phrase.

This may be regrettable but as the patient Job said, "Woe unto him that multiplieth words without knowledge."

MODERN ORGANIZATION AND AN OLD PROFESSION

What Is Meant by the Term "Profession"—Modern Continental Organization of Lawyers a Development of the Roman Profession in Its Final Form as Settled in Sixth Century—Organization of the English Bar—Early Conditions in America—Purely Democratic, Town-Meeting Type of Association of the Nineteenth Century Outmoded—Inclusive Organization of American Bar and Some of Its Problems*

BY ROSCOE POUND
Dean of the Law School of Harvard University

IN the good old pioneer days in one of our commonwealths a man conceived the idea that by putting a magnet in a box of ointment and leaving it there over night he could produce a "magnetic ointment" with marvellous powers. He impressed a community with the value of his magnetic ointment and came to do a considerable business in the way of consultations with the ailing, and prescribing different methods of using and applying the ointment according to the nature of the difficulty. Then came a statute requiring those who practised medicine to take an examination and procure a license, and the old man having neglected these formalities, was prosecuted and convicted of practising medicine without a license. In passing sentence the trial judge spoke severely about amateur prescribing of quack remedies as a menace to the general health. At this the old man broke in protestingly. He said: "You are calling me an amateur? Why, I made more money in my business in the last five years than any three licensed doctors in the county put together."

Undoubtedly the professional athlete, whose type is perhaps the professional baseball player, has confused popular ideas in this connection. The distinction between the professional and the amateur, of which we hear so much in the absorbing interest of sport, has done much to make a profession denote a money-making activity. In the face of the modes of thought engendered by sport, it is not easy to impart the conception of a group of men pursuing a common calling as a learned art and as a public service—none the less a public service because it may incidentally be a means of livelihood. In the practice of law we have never wholly lost this older idea of a profession of lawyers because the law is a tenaciously conservative calling and our books

*Address delivered at the Annual Dinner of the Conference of Bar Association Delegates, at Boston, on Monday evening, August 24.

and traditions are full of it. But the idea was sorely tried under the reign of pioneer modes of thinking in nineteenth-century America, and recent investigations of lawyers, physicians and their runners in some of our large cities show how a purely business conception and business organization of law practice along the lines which govern in commercial and industrial activities, with an eye solely to profit, may grow up as a spontaneous product of conditions in our urban communities. Those investigations show also how seriously this conception and this type of organization may impair the public administration of justice.

Let me repeat what we mean by the term profession when we speak of a profession of law. We mean an organized calling in which men pursue some learned art and are united in the pursuit of it as a public service—as I have said none the less a public service because they may make a livelihood thereby. Here from the professional standpoint there are three essential ideas—organization, learning and a spirit of public service. The gaining of a livelihood is not a professional consideration. In fact, the professional spirit constantly curbs the urges of that incident.

A profession is, then, or should be, an organized calling. It is true today almost every calling is organized in some sort of trade association or union. Also it is true that except as a growing number of states have reverted to the common-law organized profession of lawyers, for the most part in America we have had no all-inclusive or responsible organization. Typically the profession in the United States has not been organized. Until the second decade of the present century such associations as there were were purely voluntary and non-inclusive. The professional tradition was still strong enough to differentiate these associations from business and trade associations generally, but the organization was typically that of such an association not that of a profession.

It is no disparagement of honorable trades and callings which when properly carried on render real public service, to insist that an organized profession of lawyers is not primarily analogous to a retail grocers' association and that there is a generic difference between an organized bar and a plumbers' or lumber dealers' association. As has been said, the conditions of an unorganized body of lawyers in the United States made bar associations for a time in some respects like trade associations. But the root purpose is different. The trade association exists for the interests of the trade. The organized bar exists as an organization for the purposes of the law and the administration of justice according to law.

Lord Darling spoke of certain legislation enacted at the instance of trade organizations as intended to relieve the members of those organizations from the humiliating position of being on an equality with the rest of the King's subjects. An organized profession, on the other hand, seeks legislation not to evade liability but to provide for it; not to advance the incidental money-making feature of professional activity, but to make as effective as possible the primary character of public service. The want of organization which obtained in nineteenth-century America was a feature of the general tendency to deprofessionalize the traditional professional callings and reduce all callings to the level of individual business enterprise which was characteristic of the formative era of American institutions. Even without formal organization, American lawyers of the last century preserved traditional incidents of an organized profession which have been of no mean value for the due administration of justice. But the ideal of the profession involves an inclusive and responsible organization, and the movement back to that ideal in the present century is of good omen.

In the Roman polity from the end of the classical period there was constant legislation directed against abuses in advocacy. As has always happened, when there was no responsible organization to be charged with discipline and giving effect to professional ethics, such legislation achieved little. But in the fifth century and the first quarter of the sixth, Roman lawmaking moved steadily toward a well organized bar for each of the great courts. The modern Continental organization of lawyers is simply a development of the Roman profession in its final form as it became settled in the sixth century. A certain number of advocates was fixed for each court, and those attached to it formed a sort of corporation. Professional discipline was provided for. Thus the main lines which exist today had become established. In France in the fourteenth century, the advocates formed a brotherhood, which, in the sixteenth century, came to be called an order. The order was abolished at the French Revolution, but was restored in 1810. In Scotland also, which received the Roman law in the sixteenth century, the advocates are organized in a corporate body called the Faculty of Advocates.

Much of this development of organization of the profession in the civil law was influenced, if not determined, by the development of Roman law institutions in the courts of the church in the Middle Ages. The details of the history of this organization are not material for us. It is enough to say that in England of the sixteenth century, the advocates in the ecclesiastical and admiralty courts formed a society which was incorporated in the eighteenth century.

In the relationally organized society of the Middle Ages it was a matter of course for every art or craft or trade to be organized on the model of a brotherhood. Apart from the organization of the Roman lawyers, as shown by Justinian's law books, which was always a powerful example to the formative era of English law, the whole mode of thought of the time made for a society or societies of lawyers. Apparently, for the details are not certainly known, groups of law students living together in houses grew into colleges or corporations which have existed continuously as self governing societies since the Middle Ages. I need not go into the later history of this, well known to every common-law lawyer. It is enough that at the date of colonization of America there were the four great societies of common-law advocates which still endure, each having full control over education, professional training, and admission to practice, each responsible for the conduct of its members, and each with authority corresponding to that responsibility. Unhappily, in the sixteenth century the Inns of Court began to discourage students who were to become attorneys or agents for litigation, and to confine itself to those who were to be barristers or advocates. Thus in the seventeenth century the attorneys became a separate and lower branch of the profession, not organized in Inns or in any other way but simply borne on the rolls of the courts in which they practised. As a result, in the era of coloniza-

tion of America, and indeed from the seventeenth to the nineteenth century, while the barristers were well organized, had a fine professional tradition, and were subject to effective discipline, the attorneys had no organization, had come to lose most of the professional tradition, and had ceased to be under effective discipline. The effect may be seen vividly portrayed in English fiction of the first half of the nineteenth century. I need but remind you of Caleb Quirk, Esq. of Alibi House, of Sampson Brass, of Dodson & Fogg, and of Mr. Vholes. The incorporation of the lower branch of the profession about the middle of the last century put an end to these gentlemen in England. But they are by no means unknown in the unorganized profession in metropolitan cities of twentieth-century America.

Lawyers as a class were very unpopular in the American colonies. The era of the Puritan revolution, as is true of all eras of revolt, was hostile to lawyers, and this hostility was exaggerated in the colonies. Some of the colonies would not permit them at all. Education and discipline in the Inns of Court were for a time in decay and the attorneys, with whom the public came chiefly in contact, were excluded from the Inns and left to themselves. In the eighteenth century the rise of trade and commerce began to require a system of courts manned by trained magistrates, and there came gradually to be a trained bar. Much progress had been made by the time of the Revolution. An increasing number of lawyers in each colony came to be trained in England, and even allowing for the decadence of education in the Inns of Court this meant much. Moreover, with the development of colleges in the colonies, an increasing proportion of lawyers were college educated. Also there were the beginnings of bar associations—not mere social organizations but at least some of them seeking to be such societies as existed in England. There seemed every prospect of growth of a profession along common-law lines when events after the Revolution set back the whole development.

For one thing, the bar which had grown up in the second half of the eighteenth century was decimated at the Revolution. The conservatism characteristic of lawyers led many of the strongest to take the royalist side, and their places were often taken by lawyers of a lower type and less ability and education. Then, too, economic conditions during the depression which followed the Revolution gave rise to widespread distrust of lawyers and dissatisfaction with law. Political conditions had an equally bad influence. The public for a time was hostile to all things English and the law could not escape the odium of its English origin. Social conditions gave rise to disbelief in professions and deprofessionalizing of all callings. Most of all geographical conditions in a country of magnificent distances in a time of bad roads, slow transportation, and expensive travel gave rise to an extreme decentralization of the administration of justice and so of the bar. These things and the circumstance that we took the unorganized lower branch of the profession in England for our model, were decisive in the formative era of the profession in this country.

After the middle of the eighteenth century, as the bar became established in the wealthier communities, the lawyers began to organize either as inclusive associations or as the organized bar of some court. These organizations decayed in the sweep over the country of radical ideas hostile to all professions and legislation hostile to lawyers. So far as they kept a more or less continuous existence, bar associations came to be merely social in their purposes. Yet they kept a certain degree of professional organization alive until the revival in the last quarter of the nineteenth century.

There is no need of recounting the progress in organization, in formulation of professional ethics, in promoting uniform state laws, in promoting reform of procedure, and in improving standards of legal education and admission to the profession, which has followed the revival of bar associations in the last century. But great as this progress has been, the influence of these associations has not been what it might have been, and the profession has not been able to accomplish all that it could wish toward the improvement of American justice, because only a fraction of the whole body of lawyers was enrolled in them. As you know, the movement for integration of the bar in the several states has been rapidly correcting this defect. But in a land unified economically and so legally, as we have come to be, organization of the whole profession, for the country as a whole, is called for if nation-wide legal problems are to be dealt with as in the end they must be. Thus the step toward organization of the lawyers of the land in an inclusive association which is being taken today must mean no less for our administration of justice than the organization of a national association did as a turning point in our legal history in 1878.

Many questions will have to be considered as development of such an inclusive organization goes on. In the United States we always have with us a problem of balance between the central and the local. It is not possible to work out in advance on an a priori basis the most effective means of obtaining such a balance. We must be content at first with a practicable plan which starts the old organization in a new direction with a minimum of friction and waste. The great thing is that we are responding to the demands of an urban industrial society in an economically unified land by an organization of the lawyers of the land more adequate to the demands made upon them by the times.

In the Middle Ages it was a matter of course that the direction of the societies of lawyers be committed to self-perpetuating oligarchies. In the nineteenth century it was inevitable that bar associations should be organized on a purely democratic, as one might put it, town-meeting model. Neither of these models is adapted to an organization of the whole profession for a land of forty-eight jurisdictions under a federal government ruling what may fairly be called a continent. It is significant that with the organization of the lower branch of the profession in England, the balance between the central society and local societies is carefully maintained. One would expect today that the federal idea would be adapted to the exigencies of a like balance in the United States. When we organize an old profession we apply an old idea. But the genius of the common law leads us to apply that old idea in the light of time and place and thus adapt it to its new tasks. And after all they are old tasks in new guises, as the idea of organization is an old one with new applications. What we have to do is to make the best we may for the maintenance and development of the essential elements of a profession, in the secure assurance that the incidental element of the lawyer's livelihood will receive adequate individual, and so need no collective, attention.

A COMMON TASK DEMANDING A COMMON EFFORT

Stirred into Action by the Great Disorder of the World War, There Is a War of Ideas Sweeping the World Today Which No Man Can Fail to See—A New Religion, with the State as Its God, Is Fiercely Challenging Throughout the World the Ideas We Have so Long Regarded as Unassailable—The Bar as the Keeper of the Citadel of Freedom*

By Hon. John W. Davis
Member of the New York Bar

DISTINGUISHED Guests, Members of the Bar Association, Ladies and Gentlemen: In the early part of this month, I had the pleasure of a visit with Mr. Lloyd George at his home in the south of England, and the talk turned as you will not be surprised at all to learn, to Biblical topics.

He asked me whether I could guess off-hand which one of the prophets, major or minor, was his peculiar patron saint and admiration.

I did not feel that I knew enough of the inner workings of his mentality to answer that question. Therefore, I threw the answer back upon himself. He said of all the prophets the one whom he most admired or with whom he felt the greatest personal sympathy was the Prophet Jonah, because when Jonah was commanded by the Lord to go up to Antioch and make a speech, he answered, "No speech for me! I am going to Joppa instead." (Laughter.)

He added that he thought the subsequent fate that overtook Jonah was one of the best illustrations of unjustified punishment.

I, too, am an admirer of the Prophet Jonah. And when your President first suggested that I should make a speech on this occasion, I told him I was going to Joppa, and if he had any trained whales he had better get them busy. (Laughter.)

But to be permitted in your name to say a few words of welcome to our distinguished guests is a very different thing from being invited to make anything so portentous as a speech, and it is an honor and a privilege which I gladly embrace.

I preface my prefatory remarks with the prefatory statement that this has been a notable meeting of the American Bar Association. That announcement has been made, I take it, this week quite a number of times in your hearing and will occasion no great surprise. But, taking that as my text, I should like somewhat to sub-divide the subject into the customary heads of a well-organized sermon.

This has been a very notable meeting of the American Bar Association; notable in numbers in attendance, notable in the variety and scope of the subjects discussed, notable above all in the magnificent hospitality that we have received at the hands of our Boston friends. (Applause.)

The Secretary tells me that his forces kept a statistical record, and that statistical record shows that the members of the Association present at this meeting devoured on an average, three luncheons and two dinners each and every day. (Laughter.) Most heroic in performance of those duties has been our President himself. Whether his classic form and figure ever regains its original outlines is greatly to be feared. (Laughter.)

I fear that our Boston brethren on Friday night will say in Scriptural language, "The Lord giveth and the Lord taketh away. Blessed be the name of the Lord!" (Laughter.)

This has been a notable meeting of the American Bar Association, in point of achievement. By the orderly processes of amendment, by due submission to the electorate, we have adopted for ourselves a new Constitution. As the Attorney General put it last night, "The American Bar Association at last has a New Deal."

I thought I detected—and one's ears are not always a safe guide in such matters—but I thought I detected a distinct note of relief in the Attorney General's voice that he could at last commend a new deal that was thoroughly constitutional. (Laughter and applause.)

I experienced a sense of personal satisfaction in the first meeting of the new House of Delegates also, when the first contested motion came on for vote. It was a source of great gratification to me to find the Attorney General and myself voting side by side against the surrender or delegation to a committee of any of the legislative power that had been vested in the House of Delegates. (Applause.)

In addition to the revision of our own organic law, we have contributed, I hope, by our discussion of the proposed new rules of Federal practice, to make the procedure of our Federal courts so plain that a wayfaring man, even though he be a lawyer, cannot err therein. And along with this matters of great pith and moment have been debated in all of our sections and committees. In the majestic phrase of General Smuts, it really seems that the American Bar Association and the lawyers of America have at last "struck their tents and are once more on the march."

For much of the success of this meeting, for the advances we have made, I pay in your name a tribute of recognition and of gratitude for the tireless, efficient and self-sacrificing service of our President during the past year.

This has been a notable meeting of the American Bar Association because of the number and

*Address delivered at the Annual Dinner of the American Bar Association, at Boston, Thursday evening, August 27.

distinction of our guests of honor. Canada, Ireland, Great Britain, have sent us of their best and most distinguished lawyers and gentlemen. We welcome them not only on account of their rank and reputation, not only on account of our high regard for the nations they represent, but because of the keen feeling of fraternity that runs between us and all of our brethren of the English speaking Bar. (Applause.)

Never do we come together without realizing that we have common antecedents, and live in a common atmosphere. As I listened last night to that delightful address by Mr. Justice Hanna (applause) on the Bench and Bar of Ireland, I could not but think that some American Plutarch might write in plutarchian fashion, an accompanying biography of American judges and lawyers that would be instantly recognizable as parallels of those whom he described.

And if the time ever comes when Sir Maurice Amos' petition, so urgently and respectfully laid before us, is granted, and a history is written of the changes and developments of American law since the days of the original Common Law, he, I think, will be surprised, to see how closely parallel the streams of change and advance have run in his country and our own. For between the Bench and the Bar of England and the Bench and Bar of the United States, as between the countries themselves, there is an interchange of ideas that is as constant as the seasons, as persistent as the tides.

As I think of this confraternity, it seems to me that at this very moment, if I may turn to a serious vein, there lies before us a common task only to be discharged by a common effort.

At the end of the War in 1918, I met in Paris General Tasker Bliss, who was the American representative, as you know, on the Supreme War Council—certainly the most scholarly and, in my belief, the most statesmanlike man I ever saw of the military profession.

I put him a question to which perhaps it was presumptuous to expect an answer: "I said, "General, how long is this War going to last?"

He said, "Thirty years."

I said, "You can't mean that."

"Yes," he said, "This Episode will be over very soon, but the War will continue for at least thirty years."

He may have been right or wrong in his estimate; history will tell. But that there is a war of ideas sweeping the world today, stirred into action by that great disorder, no man can fail to see.

We come from the liberty-loving peoples of the world. To us life without liberty is a thing without worth. We think of this liberty in terms of freedom of thought, freedom of speech, freedom of action, and a freedom equally dear, to wit, the right of men firmly to hold that which is their own. We know that this liberty demands for its survival protection of law. We ask that those by whom the law is to be obeyed shall have their share in its framing, that it should be duly enacted and formally proclaimed. We recognize for the tyranny which it is that form of law that emerges in the guise of dictatorial edicts or the mandates of irresponsible officials. We trust the liberty in which we believe and we labor to preserve it by the laws we help to frame.

Yet these ideas, so fixed and to our minds so unassailable, are being fiercely challenged throughout the world today. A new religion has come, seeking to destroy them—a religion new in form, but in content, that has for its god "The State". According to the form it takes, whether Communism or Naziism or Fascism, its ritual differs, the emphasis upon this doctrine or upon that is altered, but all alike are sects of a common creed believing the state and not the citizen to be the all-in-all. "The State," says Mussolini, "is an absolute, in comparison with which all individuals are relative, only to be conceived of in their relation to the State." These sectaries quarrel among themselves, as sectaries always do, but they are alike in their common hatred for democracy and the belief that all democrats are infidels.

We who have drawn from the deep wells of history the lesson that to live at one man's will is all men's misery, we who still preserve our devotion to the doctrine of representative government, with the liberty it fosters, find ourselves face to face with this battle in the field of ideas. When the contest may take a more tangible form, who can say? Meantime, we of the English-speaking bar are the keepers of the citadel. God forbid that in any moment of confusion or despair we should open the gates to the enemy!

Mr. President, on behalf of the Association, I welcome to this dinner the distinguished guests who have so greatly honored us. I offer you the toast to their health and to the prosperity and survival of the great democratic peoples whom we severally serve.

Mr. Brockington Made Official of Canadian Broadcasting Corporation

(From Bench and Bar, October, 1936)

Leonard W. Brockington, K.C., has been named chairman of the new board of governors of the Canadian Broadcasting Corporation. He is known to every Canadian lawyer and as a result of his attendances at meetings of the Canadian Bar Association he has frequently been referred to in these columns as the best and most popular after-dinner speaker in Canada.

Mr. Brockington was born and educated in Wales before coming to Canada in 1912. After taking up his residence in this country he was engaged in educational work in Edmonton. Later he studied law with the firm of Lougheed, Bennett & Company in Calgary and won the gold medal when he graduated from law school. He was city solicitor for Calgary from 1922 to 1935. For the last year he has been general counsel for the Northwest Grain Dealers' Association in Winnipeg.

Mr. Brockington possesses rare qualifications for his new appointment. He acted as adjudicator in the Dominion Drama Festivals and was director of the Calgary Symphony Orchestra. He is well-known as a radio character.

Binder for Journal

The Journal is prepared to furnish a neat and serviceable binder for current numbers to members for $1.50. The price is merely manufacturer's cost plus expense of packing, mailing, insurance, etc. The binder has back of art buckram, with the name "American Bar Association Journal" stamped on it in gilt letters. Please send check with order to Journal office, 1140 N. Dearborn St., Chicago, Ill.

THE ORIGIN OF THE RULE-MAKING POWER AND ITS EXERCISE BY LEGISLATURES

PRIZE ESSAY IN COMPETITION CONDUCTED UNDER TERMS OF ROSS BEQUEST, BY GEORGE GRAYSON TYLER

THE pardonable ignorance of fourteenth century judges concerning Montesquieu and the founding fathers has been the cause of considerable embarrassment since the doctrine of the separation of powers made definition desirable. At a time when "executive, legislative, and judicial" powers were merged in the royal prerogative there was little occasion for twentieth century distinctions. Nevertheless, we are frequently driven to the historical approach in constitutional interpretation and must shift the best we can. Not the least among our difficulties is the fact that the revelation of the gospel of divided powers, insofar as it purported to be a description of the English structure, was defective and perhaps in some respects was known to be so by the members of the Constitutional Convention of 1787, for permeating their deliberations is a very obvious effort to avoid many of the abuses which hinged upon fusion of governmental power in the mother country. With this in mind we must frequently be as attentive to doctrine as to history. It must be remembered that in many ways the latter half of the eighteenth century was an age of theories, theories by which the existing order was intended to be changed as well as theories by which it was intended to be described. The Constitution of the United States was an experiment not only in federalism but, in common with the constitutions of the several states, in governmental structure also.

GEORGE GRAYSON TYLER

Many prerogatives of the British crown would not be said to inhere in the executive department of an American state simply because it was customary to do things that way in England. Indeed, some of them have been proscribed, some are obviously of legislative cognizance in a representative government, and some are so essential to the existence of an independent executive that to deprive him of them would be to abolish our form of government. A fourth class is a large group of free or tentatively allocated powers, the ultimate allocation of which by the legislature is a matter of indifference from the standpoint of constitutional theory. This situation is generally true in respect of all three departments of government, except that in the case of the legislature, by virtue of its being the law-giving department, the scope of authority may be larger and, as suggested above, may embrace control over all powers not essential to the independent exercise of its constitutional functions by some other department. To define the nature of any given power today, therefore, is not exclusively a matter of identification with some particular officer in English history.[1]

For another very important reason this statement is true. The line of kings which the battle of Hastings ushered into England was in a real sense sovereign. Until comparatively yesterday government in all its branches was the monarch's personal property and, although he may have governed with the advice, he did not do so by the authority, of his ministers. Whatever authority they possessed was derived from him. Their acts were his acts, however little, as time went on, his active participation came to be. Even Parliament itself was not a legislature in the modern sense but a high court summoned by the sovereign to declare to him what the law was rather than to assist him in making it.[2] The Curia Regis was its core and performed largely judicial functions insofar as its members were not merely advisers as to policy. It is incon-

1. Blackstone apparently conceived of the administration of justice as a phase of the executive power. "A court is defined to be a place wherein justice is judicially administered. And, as by our excellent constitution the sole executive power of the laws is vested in the person of the king, it will follow that all courts of justice, which are the medium by which he administers the laws, are derived from the power of the crown." The power of the judges "is only an emanation of the royal prerogative." 3 Blackstone, Commentaries on the Laws of England (1st Am. ed. 1807) Ch. 3, pp. 23-24.

2. See generally McIlwain, The High Court of Parliament (1910).

ceivable that in parcelling out to them the execution of various governmental functions the King considered himself bound in any way by theoretical distinctions as to the separation of powers. They were joined in him—why not in his ministers? The sole governing principle was convenience. As a consequence the superior officers of state were jacks of all trades who were governed in their mutual relations by no considerations of divided powers.

True, it is not long before specialized functions such as that of adjudication begin to become identified with particular officers of state. But it is not plain that all the powers they had at their disposal and habitually exercised were judicial. We might not even admit the propriety of many of them; we should certainly not assert they were exclusive.[3] The only perceptible change in the character of their duties was one of emphasis and one must pick one's period to define it. Gradually the large reservoir of unrelated powers contracted as non-user grew into abdication, but there is no evidence that the courts for this reason thought they had obtained a monopoly on what remained. And so there is still the *caveat* that in any attempt to define a governmental function by the character of the body exercising it in English history it must be remembered that in early England the government was one of fused and not divided powers. We cannot proceed automatically. The courts recognize this, whatever their language, and the burden of the average historical investigation into judicial power is that a given function may or may not be delegated to the courts or may or may not be exercised without a legislative grant of authority.[4] Seldom do we meet with a historical argument to prove more than this.[5]

There should be little doubt that at a time when the courts were in their formative stage the question of who should prescribe rules of procedure was not hotly contested. In the first place, no one but the courts was interested. And so far as the courts were concerned, we can well imagine it was not so much a question of power as of necessity. It was necessary that the case be presented to the judges in some fashion, and it is inconceivable that they did not exercise some control over the manner of presentation either by general rule or by superintendence in the individual case. That a large body of procedural rules was developed by decision in connection with the highly specialized forms of action is plain,[6] but when we speak of procedure in the sense in which it is used by such texts as Pollock and Maitland[7] or Holdsworth[8] we are often speaking of remedies and not of practice, which is the subject of the present investigation. Practice in the narrow sense can probably be limited to the conduct of legal proceedings as distinguished from the object to be attained by them or the form in which relief will be granted.[9] We know rules of practice were early developed, but we are ignorant of exactly when they began. It is safe to say, however, that they must have been exclusively home-made. It is inconceivable that in the beginning the methods and proceedings of the King's justices were matter for the supervision of a legislative body.[10] If Parliament exercised any control in the matter, it was as a court, as the House of Lords is today. There was no legislative body. Indeed, if the power itself was thought to exist, it must have been ascribed to the King, whose exercise of it to control the conduct of proceedings before *his* justices would hardly cause us to alter our opinion as to the origin of the rule-making power. But it is highly improbable that any formal rules of practice existed earlier than the fourteenth century. It is likely that regulation of practice prior to that time was by decision.

The general rules and orders of whose history we have some hint from Tidd[11] are said by Jenks[12] to have the same legal footing as the modern Statutory Orders in Council, though in fact and historically inclining somewhat heavily towards judicial legislation. "These go back for a long period in English legal history; and it is impossible, without further research into the archives of the fourteenth century, to state definitely when they began."[13]

Tidd is the author most frequently cited to support the variety and antiquity of court-made rules of practice. In the tables preceding his text[14] are many such general orders. There are also many statutes. Did the courts and Parliament jointly occupy the field or is there a difference in kind between the rules provided by the legislature and those promulgated by the judges? The learned author himself, in his introduction, gives us a hint of the answer to this question. The practice of the court, he says, is founded on ancient and immemorial usage, which might be called the common law of practice, regulated from time to time by rules and orders, acts of parliament, and judicial decisions. After declaring that rules and orders fall into two classes, depending upon whether they regulate the general practice or apply solely to the proceedings in particular cases, he refers to the restrictions in the operation of general rules to the court in which they were made and states that for the most part they concerned the mode of conducting the proceedings. To introduce regulations extending to all courts or to change or alter the proceedings themselves it was therefore occasionally necessary to resort to acts of parliament, though the object

3. If we were to characterize all the activities of English judges as constitutionally judicial in this sense, we should have to curtail drastically legislative activities in many of our states. In Virginia, for example, the administrative activities of local courts approach more closely the English pattern than is normal in other parts of the country, but there is little doubt that though the system is permissible it is not mandatory. The subject is referred to by Dickinson in his Administrative Justice and the Supremacy of Law in the United States.

4. See Wayman *vs.* Southard, 10 Wheat. 1 (1825). It is to be observed that People *vs.* Callopy, 358 Ill. 11, 192 N. E. 634 (1934), does not involve the question of a rule of court which is in conflict with a legislative provision. Nevertheless, the case has been criticized largely on the court's assumption of supervisory jurisdiction. See Panter, The Inherent Power of the Court to Formulate Rules of Practice (1925), 29 Ill. L. R. 911.

5. An exception to this rule is Kolkman *vs.* People, 89 Col. 8, 300 P. 575 (1931), where the court was disposed to take Wigmore's Editorial Note in (1928) 23 Ill. L. R. 276 seriously and sustained its own rule relative to comments upon the evidence in criminal trials in the face of a legislative repudiation of it. See comment in (1933) 27 Ill. L. R. 664. For a similar holding relative to a rule perhaps more clearly a matter of exclusive judicial regulation, see Epstein *vs.* State, 190 Ind. 693, 128 N. E. 353 (1920), and comment thereon in (1921) 34 Harv. L. R. 424.

6. One authority dates the growth of ordered legal procedure from the reign of Henry I, at which time two laws, covering venue, summons to the court, appearance, and pleadings, were given to the judges as a point of departure. See 3 The Complete Statutes of England (1930) 91.

7. 2 Pollock and Maitland, The History of English Law (2d ed. 1923) Ch. IX.

8. Holdsworth, A History of English Law (1932) *passim.*

9. See Tidd's Practice (9th ed. 1828) lxxi.

10. Rosenbaum, The Rule-Making Power in the English Supreme Court (1917) Ch. 1.

11. Tidd's Practice (9th ed. 1828) Introduction and Tables.

12. Jenks, A Short History of English Law 190.

13. *Id.*

14. Tidd's Practice (9th ed. 1828).

of uniformity was frequently achieved through the adoption by all the superior courts of common law of the same general rules. Yet differences which survived this double influence of cooperation and statutory enactment continued, apparently, to be many and sufficiently vexatious to cause our author to footnote (in the subjunctive, as befitted a member of the Inner Temple) a wish that they be abolished in the interests of simplicity.

The imperceptible line which in many instances separates right from remedy must cause us to hesitate to exclude the legislature constitutionally from all participation in creating rules of practice.[15] Though we may concede that the control of proceedings before it or before dependent tribunals may be an inherent function of a court of justice on the double ground of jurisdiction and necessity, we may yet be limited in one justification of a supervisory jurisdiction to the not untenable ground of expediency. To do so it may be convenient to speak of the power we are conferring as judicial but we should keep aware of the sense in which we are using the term—that we mean a power which may be delegated to the judges. Similarly, it may be advisable to extend the judicial function to embrace alterations in the nature of proceedings or the availability of remedies, but it is scarcely possible at this late date to do so by other means than legislative grant. Whatever jurisdiction the courts may once have exercised in this direction by direct action has long since been abdicated, except as the right has been reserved to proceed by decision.

The earliest rule which Tidd records dates from 1457, the 35th year of Henry VI, and embraces a variety of subjects, among them the duties of prothonotaries in the Court of Common Pleas. One function conferred upon this officer either originally or at a later date in the history of his career was that of drawing up "general rules, for regulating and settling the practice of the court,[16] and the proceedings therein; and to certify the court in matters of practice, when required." By that provision alone the antiquity of rules of court is vindicated. Tidd's tables for the Court of King's Bench begin at a somewhat later date and include no rules or orders prior to 1604, but it is hardly to be supposed that none existed prior to that time. It is probable Tidd merely had no occasion to cite them. We have the opinion of Jenks that court-made rules of practice go back uninterruptedly through the years until they are lost in the still unexamined archives of the fourteenth century.

The character of English statutes on the subject from the earliest days is strong evidence that Parliament confined itself largely to acting in aid of the courts, leaving to them the general management and control of practice. While there have been numerous corrective statutes[17] and several embodiments of a newly created public policy, those which come closest to infringing the ancient judicial prerogative were probably enacted almost exclusively to achieve that uniformity of which Tidd speaks in his introduction or of effecting an alteration in the fundamentals of procedure.

Tidd's first edition,[18] and indeed the earlier of his subsequent ones, came at a time when there was general satisfaction among the bench and bar with the existing system. Until the turn of the nineteenth century there was probably never any great public interest in the subject of procedure.[19] The historic struggles of the seventeenth century had been concerned almost entirely with bridling the royal power, first by the concept of a fundamental law (perpetuated in our doctrines of judicial review) and then by the conception of parliamentary sovereignty.[20] In the eighteenth century interest had centered about the installation of the party system and cabinet government. Until the radical revision of the economic and social structure occasioned after 1760 by the Industrial Revolution, rules of civil procedure were not ill adapted to the ends of justice or at least did not greatly offend the public conscience. But when the tempo of life increased many inconveniences began to be evident, the ponderous machinery was seen to breed injustice, and public resentment became articulate. The ensuing struggle for reform, however, was hard put to overcome the stubborn resistance of both bench and bar, whose pride of authorship was so intense that any suggestion of change was sacrilege. Accustomed as they were to viewing the administration of justice as their private property and to considering themselves as the sole repositories of centuries of legal learning, judges and practitioners were impatient with criticism. The history of English reform is a description of a continued effort to persuade the courts and the members of the bar to save themselves. Few attempts were made to remodel procedure by legislative enactment. Yet, it is possible that the public might eventually have been driven to this expedient had not the profession recognized the danger in time.[21]

In 1833 many anomalies were removed, but the rule-making power was left to the judges, resulting in the famous but somewhat disappointing Hilary Rules of 1834. By 1852 Parliament found it necessary to act again and this time a code containing 239 sections was passed. As if to show that the hope of eventual salvation at the hands of the judges had not been abandoned, however, the legislators included the remarkable provision that the judges were to be free to alter any of the rules therein contained.[22] The statute may therefore be said to have been hardly more than a notice served on the judges of what was expected of them. Even this pretense was discarded in the Judicature Act of 1873, by which jurisdiction was returned intact to

15. The difficulties in the way of giving constitutional control over civil procedure to any one department of government are well stated by Mr. Rosenbaum. Insofar as the function pertains to the carrying out and practical enforcement of the law, it belongs to the executive department; insofar as it aids judges to arrive at the true issues in controversy, it is judicial; insofar as it has a binding effect on the conduct of the parties, it is of legislative nature. Even were it possible to allocate any particular rule to one of these classes, we should find elements of one or both of the others. See Rosenbaum, The Rule-Making Authority in the English Supreme Court (1917) Ch. 1.

The power to admit or disbar, which the courts have long claimed for themselves, is discussed from the constitutional standpoint in Lee, The Constitutional Power of the Courts over Admission to the Bar, (1899) 13 Harv. L. R. 233.

16. Note, it is the narrower term practice, rather than the broader one procedure, which is used.

17. See Sunderland, The Exercise of the Rule-Making Power, (1926) 12 Am. Bar Assn. Journ. 548.

18. Published in the last decade of the 18th century.

19. See Sunderland, The English Struggle for Procedural Reform, (1926) 39 Harv. L. R. 725.

20. See Dickinson, Administrative Justice and the Supremacy of Law in the United States.

21. The English struggle for procedural reform is described in an article by Professor Sunderland appearing in (1926) 39 Harv. L. R. 725.

22. On at least one occasion an English court has spoken of the power to make rules for the regulation of their practice as inherent in all courts. Bartholomew *vs.* Carter, 3 Man. & G. 125, 133 Eng. Rep. 1083 (1841). The rule there sustained provided "that in every case in which a defendant shall plead the general issue, intending to give special matter in evidence by virtue of an act of parliament, he shall insert in the margin of the plea the words 'by statute.'"

the judges. The only substantive change in the rule-making power of the courts during this period was on the side of granting the power and providing the machinery to make uniform rules for all the courts. In England today Parliament and the public judge the results and retain the right of criticism,[23] but experts formulate and improve.

In the United States, for a variety of reasons, the development has until recently been all the other way. In the middle of the nineteenth century there was here the same dissatisfaction with technical and outmoded forms of procedure, but we decided to look to the legislatures for relief. Furthermore, in the United States there was not, as in England, the same opportunity for making public pressure effective along traditional lines. Professor Sunderland has shown us how convenient it was in England to have a centralized bench and bar at which to point an accusing finger.[24] That focus was lacking here. In the back of our minds was perhaps also the feeling that court regulation in the past had been a usurpation at best. Our theory of government seemed, to apprentice-trained lawyers who defined rights in terms of remedies and procedure, to require that legislatures regulate procedure in order to retain their control over substantive law. The right to make any rules the function of which was to govern the conduct of individuals was conceived to belong to the legislature. Little reason was seen for excepting rules of procedure.[25]

The wave of popular enthusiasm for legislative regulation which took the country by storm in 1847 was fathered by David Dudley Field. The first codes of procedure were modest and, having overthrown much of the ancient learning by abolishing the forms of action, substituting what is still known as the single form of civil action, and replacing issue pleading with fact pleading, left many details to be worked out by the courts. It was not until the '70's that it became the fashion to cover everything by statute. On the occasion of this event in California, Field expressed himself in a congratulatory telegram which suggests the philosophy behind his movement: "All honor to you for your great work accomplished! It will be the boast of California that, first of English-speaking states, she set the example of written laws as the necessary complement of a written Constitution for a free people."[26] What has experience to record as to the fulfilment of such high hopes? The State of New York, which was the first of Field's disciples and adopted a code of his making in 1848, to be followed in 1876 by another regulating procedure in infinite detail, appointed a Board of Statutory Consolidation in 1912. Its report on a plan for the simplification of civil practice shows how low enthusiasm for legislative regulation had sunk in 40 years, for in the following few words it entirely eliminates the subject from discussion:

> The present code system in this state of regulating details of practice by statute has been tried and has so lamentably failed and has been condemned in such unmeasured terms, that it may be passed by without further comment.

A strong body of opinion has recently formed favoring the restoration to the courts of the entire rule-making power[27] and it is not an unreasonable prediction that in time the judges everywhere in the United States will find themselves again in authority over the conduct of the cases which come before them. Some states never abandoned the principle, others have returned to it, and the rest are already showing signs of ultimate surrender.

Why has legislative regulation proved such a disappointment? The reasons are several, but it is principally because no system of procedure can be created *a priori*. It must be adapted to the realities of practice, not logic. Since even the realities of practice are shifting and uncertain and new situations constantly arise which cannot be foreseen, it must be flexible and adaptable, capable of easy and speedy amendment, and replete with opportunities for the exercise of sound discretion. In a certain sense any rule of practice is tentative. It is therefore hardly a subject for legislative enactment. Codes of procedure are rigid and highly formalistic. They are minute without at the same time being inclusive, because they are based on an impossible illusion that generality can be achieved through the particular. Not that particularity does not have its advantages, but it should be accompanied by a residuum of power to mitigate hardship[28] and to deal with the unforeseen situation without the necessity for fitting it into a hostile mold. This alone would require some delegation to the judges. But beyond this is the all too evident fact that intelligent particularization calls for a fund of experience which the legislatures do not possess. As compared with rules of court, legislative rules of practice are formulated *in vacuo*. The legislature does not have that daily contact with the machinery of justice which is necessary to judge detail. The most it can wisely determine is policy.

There is likewise the problem of the lawyer-legislator. When we place the rule-making power in the hands of the legislatures we are putting the administration of justice at the mercy of inferior lawyers. It is the unusual lawyer who goes to the state legislature except at the beginning of his career, in which case he is without experience, or at the end of it, in which case it is a confession of futility. He seldom has the background to formulate intelligent rules and often has an interest in sponsoring arbitrary ones. The judges, on the other hand, are usually men of respectable attainments, and, when unable to handle all the work themselves, can better choose expert assistants.

Codes of procedure are notoriously difficult to amend intelligently.[29] Little interest is taken in this subject by the average legislature, faced with political questions of greater apparent importance. As a consequence amendment is both difficult and capricious. Above all it is not expeditious. Neither continued interest nor daily contact is present to keep the rule-makers alive to changing needs. The amendments

(*Continued on page* 817)

23. See the commissions appointed from time to time to investigate the state of practice and consisting almost entirely of laymen, described in Sunderland, The English Struggle for Procedural Reform, (1926) 39 Harv. L. R. 725.

24. *Loc. cit.*, note 23.

25. See Pound, Regulating Procedural Details by Rules of Court, Supplement to March, 1927, issue of Am. Bar Assn. Journ. p. 12.

26. Quoted in Cushing, The Rule-Making Power, *id.* p. 7.

27. See the following discussions: Sunderland, Cushing, Hinton, Cutting, and Pound in Supplement to March, 1927, Am. Bar Assn. Journ.; Sunderland, The Exercise of the Rule-Making Power, (1926) 12 Am. Bar Assn. Journ. 548; Wigmore, Editorial Note, (1928) 23 Ill. L. R. 276; Procedure by Rules of Court, (1917) Journ. Am. Judic. Soc. 77.

28. Courts will occasionally waive rules of court for such purpose. See Shute *vs.* Gilliard, 2 Chan. Cas. 250, 22 Eng. Rep. 930 (1677), where the Lord Chancellor brushed aside a host of technical objections with the simple remark, "Where there is Right and Equity, Forms of the Court and Orders shall not hinder me to examine it."

29. Yet they are in frequent need of it. See for a description of California's experience Cushing, The Rule-Making Power, Suppl. to March, 1927, Am. Bar Assn. Journ. p. 7.

LAWYERS FROM NINE STATES GATHER AT REGIONAL MEETING IN KANSAS CITY, MO.

Objects of Regional Meetings Explained by Chairman Lashly—Morning Session Devoted to Discussion of Unlawful Practice of Law—President Stinchfield Speaks on the Work of the American Bar Association—George M. Morris, Chairman of House of Delegates, Stresses Need for Cooperation under New Plan—Other Addresses

IN a hall of the magnificent new municipal auditorium in Kansas City which will house the annual convention of the American Bar Association next year, some 250 lawyers from Missouri and the eight surrounding states gathered on Saturday morning, October 10th, for a regional meeting sponsored by the American Bar Association. Present were the President of the American Bar Association, a former President, the Chairman of the House of Delegates, two other members of the Board of Governors, state bar association Presidents from six jurisdictions, half a dozen presidents of large local bar associations, and a number of committee and section chairmen of the American Bar Association, members of the House of Delegates, and lawyers who had gathered for this occasion.

The meeting followed a day and a half of interesting sessions of the annual meeting of the Missouri State Bar Association, and was, itself, followed by the official banquet of that organization. It was the largest regional meeting which has been held in the mid-west, and the program proved interesting and worth-while.

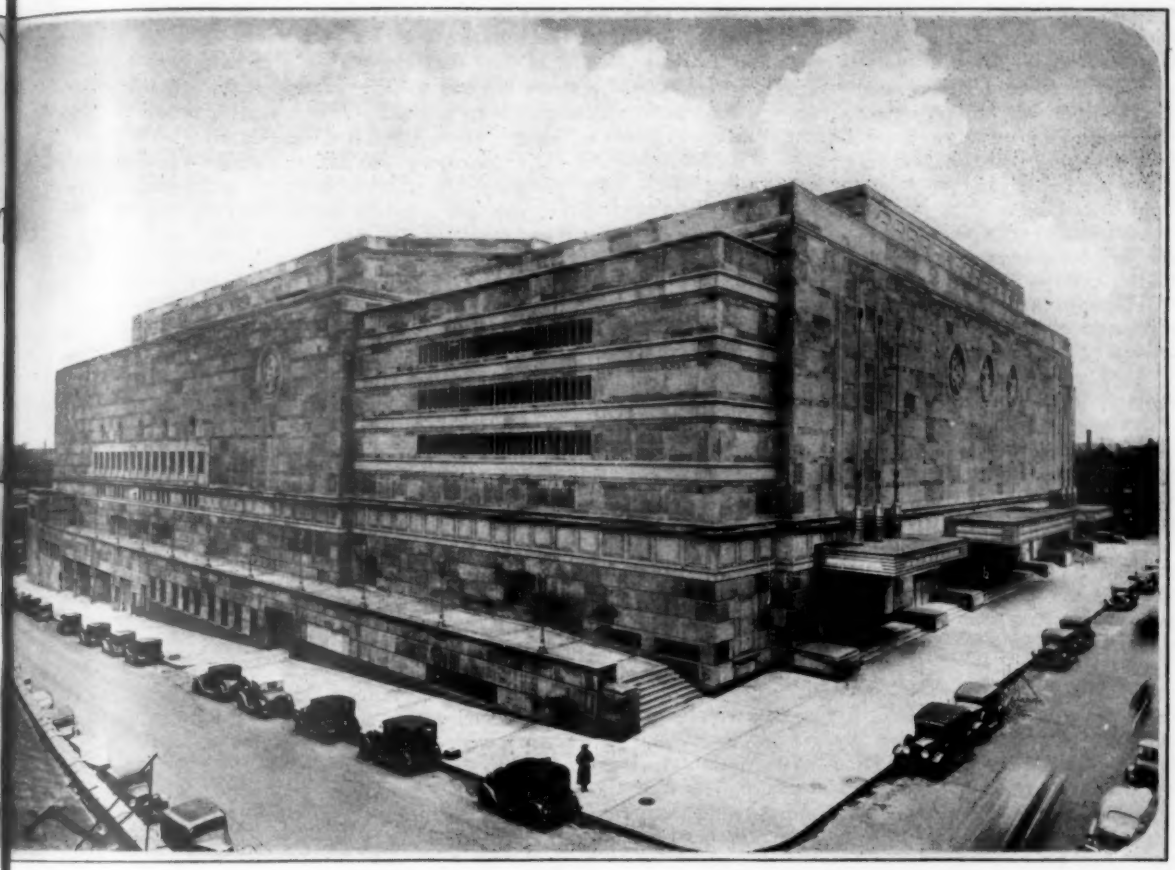
The meeting was opened by Mr. Jacob M. Lashly, of St. Louis, a member of the Board of Governors from the Eighth Circuit, under whose direction the meeting had been arranged. Mr. Lashly briefly pointed out the objects of the regional meetings which, he said, were principally two, Education and Co-ordination. In the first place, it was desired to bring together lawyers from a particular region to exchange information concerning local problems and hear first-hand from the men whose responsibility it was to solve these problems; and secondly, it was necessary if the bar was to attain the dignity and influence to which it aspired, that it must do this through integrated and cohesive movements which would assure a unit impact on the public consciousness.

He introduced Mr. Stanley B. Houck, of Minneapolis, chairman of the Association's Committee on Unauthorized Practice of Law, who then presided at the morning session devoted to that subject. Mr. Houck referred to the progress which had been made over the country in suppressing the practice of law by laymen and lay-agencies, and outlined the work which his committee had done on this subject. He pointed out that the ultimate test in each case should be the public interest and emphasized again that the object of the work in this field was primarily the protection of the public against incompetent handling of legal business.

The first speaker on the program was Joseph D. Stecher, of Toledo, chairman of the Junior Bar Conference of the American Bar Association. He dealt principally with the effect of Unauthorized Practice on the younger lawyers, and referred in detail to developments in Ohio.

"Younger lawyers," he said, "are keenly and vitally interested in these problems. They are insisting that something be done about them. At the same time, and I want to make this clear to you, the younger men are not proposing to take the torch and run away with it. Dealing with these problems requires something more than clamor for reform or the mere unearthing of evidence. It requires mature judgment and tact lest our motives be misunderstood. It requires, in many instances, the prestige of the experienced lawyer. It requires the united support and aggressive action of all lawyers, not merely the insistent demands of a restricted group. The younger men can and will help but experienced leaders should be in command. It is another tribute to our profession that many successful lawyers, who no doubt suffer little personally from these encroachments, are unselfishly and tirelessly devoting their time and efforts to remedying the situation. They are motivated not by desire for self-aggrandizement but by pride in a noble profession."

Mr. William C. Ramsey, of Omaha, secretary of the National Conference of Commissioners on Uniform State Laws, and a former member of the Unauthorized Practice Committee of the American Bar Association, reported on recent developments in Nebraska and particularly on the case of the State ex rel Wright, Attorney-General vs. Barlow, County Judge, in which the Supreme Court of that State held that the activities that are engaged in, and not the fact that a person does or does not ask for or receive a fee for his services, determines whether or not he has been engaged in the illegal practice of law. The opin-



ion was a comprehensive one and contained a statement that the court had the power to adopt rules fixing the qualifications for admission to the bar as well as the exclusive power to disbar licensed attorneys who had been unfaithful to their trust. In reference to further activities of the Attorney-General, Mr. Ramsey referred to other cases which had been brought and concluded by saying: "These recent cases against the alleged 'runners' are not yet at issue, but it is the sincere and earnest hope of the Bar of my state, if the facts alleged can be proven, as our Attorney General seems confident they can be, that these alleged 'runners' for 'ambulance chasing' lawyers will be properly punished for their contempt of court. We believe that it will tend to put an end to the unethical and unprofessional practice of 'ambulance chasing' in Nebraska. We also believe that the successful prosecution of these cases against the alleged 'runners' will 'blaze the trail' for similar proceedings in courts of other states, and if the reprehensible practice of 'ambulance chasing' can be stopped, it will command a greater respect for law, for the courts, and for the officers of the courts, who have been duly licensed to practice, which all of us so much desire."

Mr. Boyle G. Clark, General Chairman of the Bar Committees of Missouri, spoke on the topic "In the Public Interest," and showed why only lawyers should practice law. In referring to the solicitation of business, he said, "And it matters not whether the solicitation is effected through the agency of a runner on the streets or through organized 'snitchers' of commercial practice such as collection agencies and the disreputable law lists. If it is in the public interest to suppress the solicitation of personal injury cases, it is in the public interest to suppress the solicitation of commercial law practice."

He paid tribute to the work of the integrated bars in the following language: "No agency, voluntary or official, lay or professional, has been able to contribute so much to the advancement of the welfare of the bar and the attainment of these objectives as the integrated bars of the United States now numbering seventeen. These official bar associations, these arms of the state governments, have not been masters of the bar nor ends in themselves but are the weapons with which the profession is regaining the prestige of the day of John Randolph and William Pinkney. Some pressing local problems within the jurisdiction of the various state bars will soon be in hand; then will come the welfare of the profession throughout the nation, then will come the necessity for national concert of action to consolidate the gains. And, as we have noted, as we live we grow, and as we grow we seek higher goals. By that time we shall have grown, we shall have passed the objective which we have so recently amended and there will be other goals**." Mr. Clark closed his remarks with an appeal to the American Bar Association to assume the leadership which the integrated bars are expecting of it.

Following Mr. Clark's address, the Chairman presented a telegram from Mr. Edwin M. Otterbourg of New York condemning the so-called "Good Will Courts" presided over by judges, ex-judges and lawyers, which are being broadcast over the radio, in that

they tend to mislead the public and are a violation of Judicial Ethics and Professional Ethics. By resolution this matter was referred to the American Bar Association Committee on Unauthorized Practice, and a further resolution was adopted that a message be sent to the President of the New York County Lawyers Association stating that the meeting concurred in the sentiments expressed in the telegram concerning these "Good Will Courts." A number of chairmen of local bar association committees were then called on and made brief statements concerning conditions in their localities and the activities of their committees.

The morning meeting was followed by an informal luncheon at the Kansas City Club, attended by 220 lawyers. There were no speakers at this luncheon but Mr. Lashly introduced many members of the official family of the American Bar Association and of the participating state and local associations.

The afternoon session was presided over by Judge Orie L. Phillips, of the United States Circuit Court of Appeals for the Tenth Circuit. He introduced President Frederick H. Stinchfield of Minneapolis, who spoke on the subject "The Work of the American Bar Association." He emphasized the time and effort put in by members of committees and sections of the American Bar Association without any remuneration whatsoever in the effort to bring about a better administration of justice. In particular he pointed to the work of the Committee on Administrative Law and the Coordination Committee, which subjects were represented on the afternoon program, and showed that an enormous expenditure of time had been involved in reports of the Administrative Law Committee and in the work of the Co-ordination Committee, which finally culminated in the adoption of the new Constitution of the Association in Boston.

"One thousand two hundred nineteen lawyers last year donated their time and money for the work of the American Bar Association," Mr. Stinchfield said. "It's not the same men who work every year, although there are a good many who so love labor that they take on the burdens year after year. It's somewhat hard for me to understand how there can be such intense love for endless work. I understand why retired presidents so infrequently appear on committees thereafter.

"We have some 28,000 members in the American Bar Association, but there are 175,000 lawyers in the United States. A 17% membership is not enough! Acceptance of the benefits of the work of 17% by the 83% isn't fair. About 75,000 men belong to local bar associations. I can't for the life of me see why all of them aren't members of the American Bar Association. By joining the local bar associations, they evidence appreciation of the value of bar associations. I shall have hope in talking this year to demonstrate the absolute duty on the part of every lawyer, particularly the members of local bar associations, to belong to, pay his dues, and do some work for the American Bar Association. That result can be accomplished if we can make every lawyer understand two things: First, that it is his duty to the profession to support an organization which works only for the profession and for the public, and, secondly, that if he doesn't join, he is accepting priceless benefits for which he pays nothing. I cannot believe that any lawyer anywhere is willing to accept benefits without the payment of a fair and reasonable consideration. It has, of course, been always clear that it is the real duty of every lawyer everywhere to do whatever he can for the betterment of his profession. But the abstract sense of duty does not yet seem to have been adequate to cause lawyers to give support to the American Bar Association to a greater extent than about 17% of all the lawyers there are. It's inexplicable."

After detailing the actual amount of time spent by the two Committees referred to, he concluded: "Now, you tell me how much lawyers owe the men on these committees. And when I say owe, count it in time or gratitude, as you like. What would it have cost to accomplish what they have done had there been a fund from which the money could have been paid? What burden does it put upon your sense of gratitude —any of you men who have done nothing but pay $8.00 a year to the Bar Association? How much of a burden does it put on the lawyer who has not even taken enough interest in the Bar Association to become a member? How long will lawyers accept benefits without even a sense of gratitude or without any attempt to repay?

"When for the rest of the afternoon you listen to Colonel McGuire and George Morris telling you what their hopes are, remember that in all they say they speak from utter devotion to the two causes they serve, with information gained from every conceivable source, and out of a deep idealism, all offered on the altar of the American lawyer."

Mr. George Maurice Morris, Chairman of the House of Delegates, chose for his topic the subject "Just Married,—Will the Honeymoon Last?" Under this heading, he discussed the new union between the American Bar Association and state and local associations and the necessity of co-operative effort in the future. He referred to the difficulties of transporting the understanding and technique of a successful effort of a bar association in one locality into another locality in the absence of an adequate clearing center for information and aid. He referred to the Conference of Bar Association Delegates as a body which had striven to help in these directions, but had inadequate facilities for doing so. He then commented on the new legislative agency of the American Bar Association, as follows: "The structure of the House of Delegates offers opportunities to remedy these defects. Its members who come from state, local and affiliated organizations, are elected to an authoritative body. By that election and by their acceptance of membership in that body they are charged with responsibilities both by their constituents and by the House in which they sit. One of these responsibilities is to harmonize the efforts of the bar from which they come with the efforts of the national body and of the lawyers in all the other state and local groups. Just how this is to be done with a minimum of lost motion involves many questions, but the duty is there and the essentials of machinery to discharge the duty are there.

"Another problem is the discovery of ways to increase the interest of the individual lawyer in the national association in order that means to accomplish its new objectives may be secured. What can be offered to secure the support of those of us who do not happen to be at the moment charged with the responsibilities of office? There will always be, of course, a sizeable number of the profession who will be members of the American Bar Association because they believe in its purposes; because they take pleasure and value from the contacts they make at its national gatherings and in regional meetings such as this one;

because in section and committee meetings they get information and ideas of value in their fields of endeavor; because they find the speeches and papers at the annual meetings attractive; because they find some prestige in the fact of membership. In general, however, most of the members are free to attend but the single annual meeting which is held in their vicinity over a long span of years and many of them attend no meetings. These men must be given some sustained value which is both concrete and apparent.

"The answer probably lies in projects which assist the member in the daily practice of his profession. The objective may be reached in part through an expansion of section and committee activities to deliver information and aid to the man who cannot regularly attend the meetings of these groups. The answer may also be found through the informative service which the Board of Governors is especially charged, under the new Constitution, to develop. This is the so-called 'service letter' idea. The Board is now exhaustively exploring the scope and personnel for such an undertaking. In my judgment the possibilities in these two fields are so enormous that the time may very well come when a man can hardly afford to practice law without being a member of the American Bar Association. Notwithstanding this confidence, however, those of us who have gone into the subject have seen that there are visible many difficult problems in working out these projects and realize that there are probably as many obstacles which are not now visible. Be the hindrances what they may, however, our job is to make membership in the American Bar Association of constantly current value to the entire legal profession; I think that we can do it."

Following Mr. Morris' speech, Judge Phillips called on a number of representatives of state and local bar associations.

Colonel O. R. McGuire, chairman of the Administrative Law Committee of the Association, was the last speaker. His address was entitled "Sailing Close to the Wind, or the Need for a Federal Administrative Court." He urged the necessity of subjecting the decisions of administrative officers to review on both the law and the facts in a trained tribunal absolutely divorced from all control of the administrative officers and politicians. (Colonel McGuire's address will appear in a subsequent number of the JOURNAL.)

Missouri hospitality was in evidence at all times and particularly at the complimentary banquet given to the Missouri Bar Association and to visiting lawyers by the Kansas City Bar Association on Friday night, and at the annual banquet of the Missouri Bar Association on Saturday night. Many of the out-of-state lawyers stayed for the latter occasion and enjoyed the program which was presided over by President A. L. Cooper of the Missouri State Bar Association, and consisted of responses from President Stinchfield, of the American Bar Association, President-elect Kenneth Teasdale of the Missouri Bar Association, Judge R. V. Fletcher of Washington, D. C., Honorable Lee Carl Overstreet of Columbia, Missouri, and Dean D. J. Laing of the University of Chicago.

The organization of the meeting was skillfully handled by Mr. Lashly, and he received the heartiest co-operation from Senator Cooper, President of the Missouri Association, and John T. Barker, Chairman of its Arrangements Committee.

In addition to the speakers on the program who have already been mentioned, the following officers from state and large local bar associations and members of the official family of the American Bar Association were in attendance: Former President Earle W. Evans of Wichita, Kansas; Robert Stone of Topeka, Kansas, member of the Board of Governors from the Tenth Circuit; State Bar Presidents Cairo A. Trimble of Illinois, Robert L. Stearns of Colorado, Judge John S. Dawson of Kansas, Judge E. L. Richardson of Oklahoma, James G. Mothersead of Nebraska; Local Bar Presidents Judge Charles M. Thomson of the Chicago Bar Association, Cliff Langsdale of the Kansas City Bar Association, Ray S. Fellows of the Tulsa County Bar Association, Henry Bundschu of the Lawyers' Association of Kansas City, Sam H. Liberman of the St. Louis Bar Association, S. D. Flanagan of the Lawyers' Association of the Eighth Judicial Circuit of Missouri, and Bert J. Thompson of the Lynn County Bar Association of Iowa, Vice-President of the Iowa Bar Association; other members of the House of Delegates: Charles P. Megan of Chicago, Joe S. Lewis of Ponca City, Oklahoma, F. B. H. Spellman of Alva, Oklahoma, John T. Barker of Kansas City, Judge Frank E. Atwood of Jefferson City, Missouri, Judge Thomas J. Guthrie and Owen Cunningham of Des Moines, Iowa, and Morris B. Mitchell of Minneapolis.

Among other officials of the American Bar Association or state bar associations present were, Henry Shull of Sioux City, Iowa, Chairman of the A. B. A. Committee on Commercial Law and Bankruptcy; Judge L. B. Day of Lincoln, Nebraska, and Charles M. Hay of St. Louis, chairman and member respectively of the Resolutions Committee at Boston; Judge George H. Rose of Little Rock, Arkansas, Vice-chairman of the Conference of Commissioners on Uniform State Laws; R. Allan Stephens of Springfield, Illinois, Secretary of the Illinois State Bar Association; Charles Leviton, attorney for the Chicago Bar Association; W. H. H. Piatt of Kansas City, member of the A. B. A. Committee on Law Lists; Albert Faulconer of Arkansas City, Kansas, past President of the Kansas State Bar Association; Edgar de Meules, member of the Board of Governors of the Oklahoma State Bar; T. Austin Gavin, Tulsa, Oklahoma, member of the A. B. A. Committee on Duplication of Legal Publications; and John Biby of Los Angeles, chairman of Local Administrative Committee No. 1 of the California State Bar.

Figures and the Federal Parole System

Figures do not support those who would criticize the federal parole system, according to Sanford Bates, Director of Federal Prisons in the 1935 Year Book issued by the National Probation Association. The book contains a number of articles by experts in probation, parole and allied fields, including Justin Miller, Rev. Dr. Edward Roberts Moore, Dr. Walter Bromberg, Judge Jonah J. Goldstein and Francis D. McCabe, in addition to Mr. Bates.

To substantiate his defense of the federal parole system Director Bates states that more than 93 per cent of all the men released by the federal board have not violated the terms of their paroles or been at fault while serving out their terms. He points out further that of 90,504 persons arrested during the first three months of 1935 whose fingerprints were on file in Washington, only 509 were found to be on parole at the time of their arrest.

ADDRESSES AT THE OPEN FORUM SESSION FOR DISCUSSION OF THE PROPOSED RULES OF CIVIL PROCEDURE FOR THE FEDERAL COURTS

Attitude of Advisory Committee—Events Leading to Proposal for Uniform Rules—Problems on Which Discussion Is Invited

By Hon. William D. Mitchell
Chairman of the Advisory Committee

THE Association has for consideration today the preliminary draft of proposed rules of pleading and practice for the United States District Courts, and the program states that it is to be considered in open forum. This implies that the discussion is to come mainly from the floor and not from the speaker's platform. Invited to speak here as chairman of the Advisory Committee appointed by the Supreme Court of the United States to aid the Court in drafting the rules, my function is to say just enough to point the way to an open forum discussion.

At the outset the attitude of the Advisory Committee should be made clear. We are not here to defend this draft, nor to persuade you to approve it. The Advisory Committee makes no claim to perfection in its preliminary work. Our hope is that the draft is a sufficiently respectable document to justify its presentation to the lawyers and judges of the country as a basis for criticism and suggestion. We so present it, inviting constructive suggestions, and aware that it must contain many defects and hopeful that these defects will be pointed out and cured. The time for this is before the rules are adopted, not after they take effect.

First I propose briefly to review the events leading up to this proposal for uniform rules of procedure in the Federal courts, and then to mention some of the problems on which the Advisory Committee invites discussion.

The Act of Congress, approved June 19, 1934, under which the Supreme Court is acting, contains two sections. The first authorizes the Court to prescribe general rules of pleading and practice in civil actions at law in the United States District Courts. The second section authorizes the Court in its discretion to unite the rules for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both. The bill for this Act was introduced in Congress many years ago. Originally it contained only Section 1 and provided for rules in actions at law. The second section for a unified system was added later at the suggestion of Chief Justice Taft, who firmly believed in abolishing the distinctions in form and procedure between law and equity cases. For many years the bill failed of passage, notwithstanding vigorous support from the American Bar Association. Opposition in Congress was headed by the late Senator Walsh of Montana, and was backed by the argument that under the conformity system, pleading and practice in law actions in the Federal courts conformed with those in use in the courts in the states in which the Federal courts sit, and that a uniform system in the Federal courts, limited to law actions, destroyed conformity and required lawyers to be familiar with two systems in actions at law, one for the State courts and one for the Federal courts. This argument had substance. My own view has always been that a uniform system, limited to law actions, does not go far enough. A reform which abolishes the distinctions in pleading between law and equity is a different matter. If the bill had been amended years ago by striking out Section 1 and authorizing only a single system for law and equity cases, I believe it would have been passed at an earlier date. At any rate, with Senator Walsh's opposition missing, the bill was revived and Congress passed it.

Local committees of the Bar were then appointed by the Federal judges to assist in the work. It seems to have been assumed that the rules would be drawn under Section 1 and limited to actions at law, and the local committees began work on that assumption. However, when the Supreme Court considered the matter, it wisely concluded to effect a real reform and adopt the unified system. At the same time it decided that a central committee should be formed to coordinate the many suggestions of the local committees, and thereupon an advisory committee of fourteen was appointed. Five of them are law school men, distinguished for wide knowledge of all systems of pleading and practice. The other nine are lawyers active in the courts. It was believed that the law school experts would be able to bring to the consideration of the Committee every modern device in pleading and practice that had received a successful trial in any jurisdiction in England or the United States, and that the practicing lawyers would bring to bear on such proposals the test of practical experience in trial work.

This preliminary draft is the result of our labors to date. While it contains much that is new

to many of us, it contains no proposal that has not had an actual trial in some jurisdiction. Opposition to any change in the prevailing system in the Federal courts is out of place at the present time. The statute has been passed, and the Supreme Court has decided to exercise the powers granted and promulgate a uniform system, uniting the practice at law and equity. Our task is to assist in making those rules as good as possible. Two great steps in advance are assured by this proposal.

The first is the adoption of the principle that rules of pleading and practice should be made by the courts and not by statute. The greatest fault of the code system has been that, fixed by statute, the rules were too rigid and inflexible and not subject to prompt readjustment by the courts as deficiencies develop. All thoughtful students of the subject have long been convinced that the only sound method is to place practice rules in the control of the courts.

The second is the proposed abolition of distinctions in forms, pleading and procedure between actions at law and suits in equity. No sound reason can be advanced why different systems should prevail for the two types of cases. The reasons for different pleadings, practice and forms in actions at law and suits in equity are merely historical and grew up because of the way in which equity jurisprudence was developed. So far as the efficiency of the administration of justice is concerned, no reason supports the separate systems. No lawyer who has ever practiced in a code state with the unified system would favor returning to the dual system. Those states which have preserved, in whole or in part, the distinctions in forms of pleading between the two types of cases have done so, not because of any merit in the double system, but as a result of that traditional reluctance to change, which is characteristic of the members of our profession. England, from whom we inherited the separate procedures in law and in equity, abolished these distinctions more than half a century ago. Furthermore, the extension of the rules to equity, as well as law cases, provides a formidable argument to meet the objections heretofore offered to uniform rules in the Federal courts abolishing the conformity system in law actions. Under the proposed rules it will be necessary for lawyers to know only one system of pleading and practice in the Federal courts.

The Supreme Court now has an opportunity to establish a simple and efficient set of rules applicable to both law and equity cases which may become a model for the States, with the result that State legislatures may be led into similar legislation permitting their courts to regulate pleading and practice by rules which closely resemble the Federal rules, and thus bring about greater conformity between the Federal and State systems than is possible in any other way.

We older members of the Bar may object to any change. We know the present systems and shrink from the task of mastering a new system in the Federal courts. It may be a chore for the older members of the Bar and the older Federal judges to scrap some of their learning about equity practice and accommodate themselves to a new and simplified system, but we older men will not last forever and will soon be replaced by another generation who will welcome the abolition of antiquated systems, familiarity with which demands additional labor, and which tend to obstruct rather than to improve the efficiency of our judicial system. Our profession has often been justly criticized for failure to take the initiative in ridding justice of technicalities. We have defended ourselves by saying that the legislatures control procedure in the courts. The national legislature has now placed responsibility for effective action respecting practice and pleading in the Federal courts squarely upon the Bench and Bar, and I believe that there are many members of the profession who believe, as I do, that we should not fall short of the opportunity offered by this statute.

The Supreme Court of the United States has heavy burdens to carry. The task of drafting rules of practice for the Federal courts is one in which the members of the Bar can be of great assistance to the Court. It is our professional duty to render that assistance. The Advisory Committee of fourteen is doing its best, but no fourteen men who ever lived were competent to perform a task of this kind without the advice and assistance of thoughtful members of the profession throughout the country. We are asking the members of the Bar to give this draft thoughtful consideration, with sympathy for the difficulties of the task confronted by the Advisory Committee, and to submit to the Advisory Committee constructive suggestions for improvement.

So much for the general situation.

Turning now to the draft itself, it may be sufficient if I point out some of the principal problems confronting the Advisory Committee.

(1) An important question for decision relates to the manner of bringing suit and filing papers, dealt with by Rules 3 and 6(b). Alternative systems are presented. One is that generally prevailing in the Federal courts requiring that in all cases, to commence a suit the complaint must be filed with the clerk and the summons issued thereon, and that all pleadings and other papers in the case thereafter be filed when served. Another suggestion is to allow the suit to be commenced by the service of summons and complaint, but without requiring anything to be filed with the clerk except upon demand of the adverse party, unless and until the court is required to take some action in the case. A third proposal is a compromise between these two, allowing the suit to be commenced without filing the complaint but requiring it and all other subsequent papers to be filed within a specified time after service. Those who favor the old system in the Federal courts, requiring the papers to be filed at once, contend that a lawsuit is a formal thing and should be formally recorded; that the public should be promptly advised when a man is engaged in litigation; and that there are reasons for recording the fact of the institution of a suit, even though it may ultimately be dismissed without trial. Our brethren of the Patent Bar point out that there is a statute requiring the Patent Office to be immediately notified of the institution of any suit for infringement of a patent. Those who favor the system of allowing suit to be brought without filing any papers until the court is called upon to act, point out that the first system mentioned is cumbersome. It requires going to the clerk's office to commence a suit, and the offices are not always open, and involves additional time and labor. They present statistics showing that around 30% of private civil

actions in the Federal courts are dismissed without trial and without any action ever having been taken by the court, and that the unnecessary filing of the papers in these cases imposes additional labor on the clerks and expense by way of clerks' fees upon the litigants. Both these systems are in use. In the New York state courts, among others, no papers need be filed until judicial action is invoked, and the lawyers in that State find the system simple and time-saving. This problem is one largely of speed and convenience on which the weight of opinion of the Bar generally will doubtless prevail with the Advisory Committee when it makes its recommendations to the Supreme Court.

(2) Another difficult question is the extent to which there is authority for including in the rules provisions respecting the practice on appeals. The Act of June 19, 1934, mentions only proceedings in the lower Federal courts. Many matters which occur in the lower courts affecting appeals are admittedly within the scope of this statute, such as the settling of the records for appeal, which are matters of practice in the trial courts. There are other respects in which the Committee found it essential to touch practice on appeal, such as the effect on appeal of an error in the admission of evidence (Rule 50); or the effect of an error in the charge (Rule 57); or as to the manner of taking appeals (Rule 72); or as to the effect of the findings of a court in a jury-waived case (Rule 68). The Committee feels it absolutely essential to deal with these subjects. We have considered various statutes which enable the Supreme Court to make rules of practice, and the Committee has concluded that, if not by the particular statute under which it is acting, then by other general statutes, the extent to which we have dealt with appeals is within the power of the Supreme Court.

(3) An important matter is that of judgment notwithstanding a verdict. The Advisory Committee believes that the trial court and the upper courts on appeal should have power to grant judgment notwithstanding a verdict to the full extent permitted by the Constitution, as interpreted in *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, and *Baltimore and Carolina Line* v. *Redman*, 295 U. S. 654. The *Redman* case at least allows a judgment notwithstanding a verdict by a trial or appellate court where the trial court on a motion to direct a verdict takes the verdict but reserves the question of law with the consent, express or implied, of the parties. Whether the *Redman* case goes beyond that, we are not clear. Rule 56 deals with this subject, and we invite your consideration to it in connection with its annotations.

(4) An important problem is the form of presenting the testimony in the record on appeal. The Advisory Committee is united in recommending to the Court the abolition of the present rules requiring that the testimony of witnesses shall be in narrative form. This system tends to reduce the length of records on appeal and saves something in printing, but these advantages are more than outweighed by delays in preparing the narrative form and the heavy burden and expense on litigants and lawyers in preparing and agreeing upon narrative statements. We hope for an expression of your views on that subject.

(5) Another problem is the method of taking appeals. The prevailing method in the Federal courts in civil actions is to file a petition for the allowance of appeal, obtain an order allowing it, and then procure the issuance of a citation from the clerk's office to be served on the respondent. The rule proposed by the Committee is to allow appeals to the Circuit Courts of Appeal by merely serving a notice of appeal on the adverse party, specifying the judgment appealed from and containing the specification of errors. This is a simple system, prevailing in a majority of the states, and is that recently adopted by the Supreme Court of the United States in prescribing the rules in criminal appeals contained in Volume 292 of the Supreme Court Reports at page 661.

(6) One of the most important subjects is that of discovery and examination before trial. This practice in one form or another has been adopted in a large number of the states. Some modern rules on this subject are sure to be promulgated by the Supreme Court. The question is as to their form and operation. Lawyers engaged in trial work are disposed to shrink from an exposure of all their facts to their adversaries. It is a pleasant feeling to have an ace up the sleeve which can be sprung on one's adversary during the trial. It is a very unpleasant feeling, however, to realize that the opponent may have an ace up his sleeve of which we are ignorant. Looking at the subject from the standpoint of efficient administration of justice where the purpose is to develop the truth, and a suit is not a mere game of checkers, we must admit that an efficient but well guarded system of discovery and examination before trial is essential for the proper administration of justice. Rules as liberal as those we have proposed have been in use in the English courts for many years. Similar systems are in effect in some States of the Union. Rules on this subject should be carefully drawn to guard against abuse. On the other hand, they should be sufficiently liberal to accomplish the intended purpose. We ask particularly for careful consideration of the proposed rules on this subject. Will the Committee's proposals sufficiently guard against abuse? Should the right of examination before trial be limited to the parties, or extended to other witnesses? Any suggestions you may make based on practical experience will be gratefully received.

(7) The rules on summary judgments justify careful consideration. This is a practice widely used and very effective to expedite litigation. It does not impinge on the constitutional right to jury trial, because the system supposes that there is no substantial controversy between the parties on the material questions of fact, and the purpose of the proceedings on motion for summary judgment is to bring the parties before the court to learn which of the issues of fact raised by the pleadings are real issues and which are sham or unreal.

(8) The Act of June 19, 1934, makes no express mention of the subject of evidence, and the question arises whether rules of evidence are rules of procedure. About this there is a difference of opinion. The Advisory Committee has no intention of writing any code of evidence. We have found it necessary to touch the subject lightly to avoid any confusion which may develop in the unified system, as a result of such differences as have heretofore prevailed in the rules of evidence in law and equity

cases. Our Rule 50 is intended only to close the gap and prevent confusion and doubt.

(9) We have endeavored to preserve inviolate the right to jury trial.

(10) We have tried to preserve the existing rules respecting injunctions and have expressly avoided any attempt at interference with existing statutes relating to injunctions in controversies between employer and employee.

(11) An important question arises in connection with the effect of the findings of a trial court in a jury-waived case. The present rule in equity cases is that the appellate court has authority to review the evidence and reverse the findings of the trial judge if against the clear weight of evidence, having due regard to the fact that the trial court is specially qualified to pass on questions of credibility. The present rule in law cases in which a jury is waived is that fixed by a Federal statute which gives to the findings of the trial judge the effect of the verdict of a jury and permits his findings to be overturned on appeal only if there is a want of substantial evidence to support them. With a single system of practice and procedure for law and equity cases, we are confronted with three alternatives. The first is to retain the present system, giving a different effect to findings of a trial judge in a jury-waived case than the findings received in an equity case. This requires the appellate courts in reviewing findings of trial judges to ascertain in each case whether the issue is one of legal or equitable cognizance and tends to obstruct the uniformity of procedure which we are aiming at. The second alternative is to provide uniformity between law and equity cases by giving the findings in equity cases, as well as in jury-waived cases, the effect of a verdict. This narrows the scope of review of findings of fact in cases heretofore of equitable cognizance. The third alternative is to effect uniformity by enlarging the power of the reviewing court over findings in a jury-waived case to make it correspond to the existing authority to review findings in equity cases. The Advisory Committee recommends the last proposal. We think it would be unfortunate to limit the scope of review heretofore prevailing in equity cases. One illustration of the effect of this is found in constitutional cases. Many of the cases reaching the Supreme Court of the United States involving constitutional questions are equity cases, and in some of them the constitutional question may turn to a considerable extent on matters of fact. To limit the scope of review of findings in equity cases, would in some constitutional cases make the decision of a trial court final on the constitutional question. In many of the code states the findings of trial judges in jury-waived cases are given precisely the same weight, no more and no less, than the findings in cases formerly of equitable cognizance, and we know of no objectionable results from this system.

This brief review of some of the important problems is enough for present purposes. It is encouraging to the members of the Advisory Committee to find that members of the Bar are so intensely interested in these proposals. The rules of practice are merely the tools with which the lawyers work in administering justice. However perfect the rules may be, the results depend largely on the character and quality of the men on the Bench and at the Bar. The efforts of bar associations to raise the standards of professional conduct must be continued, and we may continue to hope that appointments to the Federal bench will more frequently be made on the basis of merit, and not as part of a political spoils system.

Although a perfect set of rules will not necessarily produce perfect administration of justice, any more than a theoretically perfect form of municipal charter will produce a perfect municipal government, we are encouraged to believe that a great opportunity now presents itself to the Bar of the country to accomplish a reform in practice and procedure that will stand out as an important accomplishment of our generation.

Historical Beginnings of Procedural Reform Movement in This Country—Principles to Be Observed in Making Rules

BY EDGAR BRONSON TOLMAN
Secretary of Advisory Committee

I

THE improvement of court procedure is no recent undertaking. It is one of the oldest tasks of civilized man.

When the King was the sole fountain of Justice, history discloses the formalism of procedure which existed in the Royal courts.

When the King became too deeply occupied with affairs of State to hear and decide every individual appeal for justice, and was compelled to turn them over to his "justiciars," formalism was not abolished. It grew and became more complex. The ermine of the Judge, the wig and gown of the barrister, were but the outward symbols of the prevailing idea that judicial procedure must be accompanied by pomp and ceremony.

The first great reform of judicial procedure in England is seen in two provisions of Magna Carta. The most familiar of these is the declaration which we read last week in Langdell Hall during Harvard's Tercentenary sessions of the Conference on the Future of the Common Law, and which has been taught to every school boy and school girl in the land in the words of the following familiar translation. "To none will we sell, to no one will we deny, or delay, right or justice."

The other provision of that great charter of

liberties wrung from an unwilling King by the armed and resolute barons assembled at Runnymede, is not so generally taught, and not perhaps so well known. By a strange coincidence it deals with the subject of venue, a subject concerning which Congress has manifested a constant vigilance, and a subject to which the Advisory Committee, apointed by the Supreme Court of the United States to assist it in the great undertaking of preparing "a unified system of general rules for cases in equity and actions at law" has been compelled to give serious thought.

The analogy between venue as the Barons and their contemporaries regarded it, and venue in the Federal courts of this country, is not without interest.

In medieval Britain, the King, as you all know, moved his court from place to place. He was here today and there tomorrow as considerations of pleasure or profit, politics or diplomacy might dictate.

The first judges, the "King's Justiciars," were his courtiers, men of his personal retinue, and where the King went, they danced attendance.

The King's subjects, therefore, in presenting to the judges of that day their pleas for the righting of their personal wrongs, the punishment of those who had injured them in pocket or in person, were also compelled in their turn, to dance attendance upon the judges, and follow the court from place to place. So great became the burden and so insistent the complaint against the peripatetic character of the Kings Courts of Justice, that the Barons insisted that there should be definite times fixed for the holding of Court sessions at designated places so that one could not drag his adversary about from place to place and from time to time with no certainty as to when the cause should be heard. Hence the words in the Great Charter: "Common Pleas shall not follow our court, but shall be held in some certain place."

It may truthfully be said that courts of justice as separate and independent tribunals with certainty of location and definite jurisdiction and venue began with the signing of Magna Carta.

So too in this country, venue became a source of concern at the very beginning of the establishment of the Federal courts. Men did not want to be compelled to leave their homes and places of business and travel long distances with their witnesses to defend suits brought against them in remote portions of the United States. As a result of that feeling, venue in the courts of the United States was, from the beginning, strictly limited and that feeling persists today. Only in special classes of cases, to a very limited extent, and with great unwillingness, have exceptions been made to the general rule that a person may not be sued in the Courts of the United States, outside of the district in which he resides.

Even today this reluctance of the people and of Congress is so plainly evident that the Advisory Committee will probably recommend no substantial change in that branch of procedural law.

II

Thirty years ago at a meeting of this Association, Roscoe Pound of Nebraska read a paper on "The Causes of Uncertainty and Delay in the Administration of Justice." So keen and true was his analysis of the causes and so convincing were his proposals for a cure of the evils, that a special committee was created by the Association to continue the study and recommend appropriate remedies.

After years of study, during all which time Roscoe Pound continued as the mentor of the committee and its draftsman, there were presented to the Association the proposals which became known as the "Canons of Procedural Reform." The first of those canons reads as follows:

"A practice act should deal only with the general features of procedure and prescribe the general lines to be followed, leaving details to be fixed by rules of court, which the court may change from time to time as actual experience of their application and operation dictates."

I lay on one side all the other canons, notwithstanding their truth and value and begin the history of this great undertaking with the name of Roscoe Pound, because his was the first clear voice raised by lawyer or law teacher in public assembly of his professional brethren to point out the right path through the tangle of technicality and blunder in which our courts had been involved through legislative control of the judicial methods of procedure.

To name all the illustrious members of the American Bar who participated in the earlier stages of this great enterprise would be to call the roll of our best and greatest men. On that roll would be found men who later became President, Vice President, Justices of the Supreme Court, Judges of the Circuit and District Court, Congressmen, Senators and others of high degree, but I cannot leave unmentioned another man who until almost the day of his death, carried on faithfully and persistently the long struggle for the passage of the measure transferring from Congress to the Supreme Court the power to regulate Federal Civil Procedure. I name with affectionate remembrance Thomas W. Shelton of Virginia.

The bill first presented to Congress, dealt only with procedure in actions at law, Congress having at the very beginning of the Federal judicial system given the Supreme Court power to regulate procedure in cases in equity and admiralty by rule of Court.

When William H. Taft became president of the American Bar Association he suggested that the bill should contain an additional section authorizing the Court to write the rules for actions at law with those controlling cases in equity so that there might be a unified system of general rules for both classes of cases. This suggestion met with approval and the bill took that form thereafter.

After the death of Thomas W. Shelton the cause languished for lack of a leader, but soon after Homer S. Cummings became Attorney General, he determined to take up this measure, which had so many times been approved by the American Bar Association. In consequence of his efforts the bill became law and was approved by the President on June 19, 1934, in the form proposed by Mr. Taft and approved by this Association.

It should here be noted that in the passage of this measure, Congress went beyond the scope of the canon of procedural reform above quoted. It

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turned over to the Supreme Court the whole province of practice and procedure in civil actions and withdrew from that field. It declared that after the promulgation of the rules, "all laws in conflict therewith shall be of no further effect."

I do not need to tell this audience of what has been done since the passage of the act of June 19, 1934, but it may be desirable to refresh your memories as to the significant words contained in an order of the Supreme Court of the United States entered of record June 3, 1935, from which I now quote:

"Pursuant to Section 2 of the Act of June 19, 1934 . . . the court will undertake the preparation of a unified system of general rules for cases in equity and actions at law . . . so as to secure one form of civil action and procedure for both classes of cases. . ."

Since the determination of this important question by the court, the advisory committee appointed by the court has proceeded with all possible diligence and its preliminary draft of rules has been in your hands for about two months.

Pursuant to the invitation of the committee, a

multitude of suggestions have come in from members of the bar in nearly every state of the union and even from England and Germany. The mass of these suggestions is even greater than the volume of the rules, and yet the process has by no means come to an end. As was to be expected the suggestions of individuals have come in more promptly than those of the various committees, only relatively few of which have submitted their reports. This second wave, however, is likely to be greater than the first. It will be our duty to analyze and consider these suggestions, incorporate into our next draft all those which prove of value and also to summarize and make all of them available to the court so that the court may finally decide upon their merit.

No such nation-wide participation of the bar in the formation of procedural law, and no such cooperation between the bar and the Court, has ever been seen before. We believe that it points the way for the perfection of judicial procedure in the future.

III

Leaving now the historical review of this movement, I venture to speak briefly of the fundamental principles which should govern the exercise of the rule-making power.

Let us first consider the evils sought to be removed from our present system. What is the matter with present methods of the trial of cases? Every one, I think, will agree that our methods of procedure have three major faults. First, delay; second, expense; third, uncertainty.

When Hamlet was summing up the list of evils in justification of suicide, among all the reasons supporting a negative answer to his question, "To be or not to be?" he included "The law's delay."

The expense of litigation is so recognized a fault that further discussion of that evil is here unnecessary.

The frequent allowance of new trials, appeals, reversals and remandment illustrate the great instability and uncertainty which we have failed to eliminate from the administration of justice.

In short, it takes too long to try our cases; it costs too much; and they don't stay tried.

The first two of these evils need no further mention.

As to the last named evil, uncertainty, I venture a few brief observations which are, I think, relevant to the making of court rules of procedure.

Legal research men have demonstrated that our appeals involve points of procedure far greater in number than questions of substantive law; that reversals for error of procedure greatly outnumber those for all other causes. These reversals and re-trials for errors in the methods employed in the trial of the case do not touch the real controversy between the parties.

If, then, we can eliminate, or substantially reduce, the reversals for procedural mistakes, great progress will be made in diminishing the law's uncertainty. Can this be done? I think it can.

If you analyze these assignments of procedural error, you will observe that every one of them in the last analysis is based upon the claim that some requirement of a procedural statute or rule has not been complied with. The more precise and rigid these requirements are, the more they deal with details, and the greater they are in number, the more grounds they furnish counsel for appeal and the more reasons they afford the reviewing courts for reversal.

What, then, is the answer to the question above propounded? To me, the answer seems plain. I would phrase it as follows:

Eliminate every requirement except the irreducible minimum absolutely necessary to point out the plain and straight path from the institution of a suit to the final judgment.

Remember that *every* command the statutes make as to the methods which court and counsel shall employ is a potential cause for invalidating the result of a long and costly trial. Cut them out whenever possible.

Be especially careful in laying down requirements as to the pleadings. The common requirements that the plaintiff must state his "cause of action," that he must state "facts," "ultimate facts," that he must not "plead law," have been the basis of assignments of error and the grounds of reversal in countless cases. Professor Carl Wheaton in a recent number of the Cornell Law Quarterly has collected references to an astonishing number of citations involving the points above referred to.

In making rules of practice, do not follow the faults of our rigid, modern statutes, the best of which contain hundreds of sections, and the worst of which contain thousands of sections dealing with hundreds of thousands of details.

Especially in the Federal Courts, cut the details of the rules to the lowest possible limit, leave something for local rules for the district courts to prescribe, and leave still more untouched and not prescribed as fixed rules but trusted to the good sense and good faith of court and counsel to be worked out by them to fit the particular situation.

A Suggestion from Egypt

Some time ago the JOURNAL received the following letter from Judge Jasper Y. Brinton, of the Court of Appeal, Mixed International Court of Egypt. It contains a suggestion which Bar Associations in this country may find of interest:

"For those Associations that are seeking to increase the usefulness of the Bar, I venture to offer the following information: There lie before me seven briefs filed by counsel on appeals. Each of them bears a blue stamp with the inscription (translated), 'Treasurer of the Bar Association, Pension and Assistance Fund, 20c.' Some of the briefs also bear two red stamps of similar denomination. These samples mean that for each brief twenty half-dimes or one dollar has been paid over to the Pension and Assistance Fund of the Bar. This fund, which is growing rapidly, has been established to furnish assistance to needy members and a retiring pension to disabled members. There are various other sources of replenishing this fund, but this stamp tax on briefs is a principal one. The scheme has been a marked success in this Bar, and it occurred to me that some of the progressive Bar Associations in the United States might devise a method of using it for the same purpose."

A Striking Feature of the Proposed New Rules—Change in Bar's Attitude Towards Improved Procedure—What Particularly Interested the Lawyers

BY CHARLES E. CLARK
Reporter of the Advisory Committee

A STRIKING feature of the new federal rules —perhaps in retrospect it may prove the outstanding event connected with their making—is that this is a reform of law administration initiated and now on its way to completion through the organized efforts of the lawyers themselves. This might not appear unusual until we remember that only quite recently have lawyers taken an active interest in improving that part of the structure of government which most concerns them. The great reform of English procedure was brought about by a long and difficult campaign of education of public opinion, the driving force of which came from laymen. True, in this country great lawyers have achieved lasting fame by their labors in this field, men like Edward Livingston, author of the Louisiana Code, and David Dudley Field of New York, the father of the Field Code and of the code reform of pleading in this country. Nevertheless, even Field was a lone worker, who carried through, by sheer force of his own intellectual strength, changes at best only half-heartedly supported, and often opposed even after their adoption, by his colleagues of the bench and bar. Many years later Chief Justice Winslow of Wisconsin, himself a great master of the art of pleading, said: "The cold, not to say inhuman, treatment which the infant code received from the New York judges is matter of history." That the code prevailed so as eventually to become the procedural system of a majority of the states and to affect profoundly the systems of all the other American jurisdictions is a tribute to its intrinsic worth, rather than to the professional support it secured. Not until this Association a quarter of a century ago embarked on its campaign for reform of federal civil procedure was there really a representative and organized movement of the bar in support of a definite procedural improvement of moment.

During the years that have passed since that campaign was first initiated, there has been considerable change in the attitude of the bar, a change in large measure due to the activities of this Association and its affiliates. The Reports of the Committee on Uniform Judicial Procedure were completely authoritative, although they were not immediately effective in persuading to action a recalcitrant Congress—possibly one should say a recalcitrant Senator, in view of the known focus of the opposition to the Association's bill for rule-making authority in the Supreme Court of the United States in matters of federal civil procedure. The Conference of Bar Delegates, the National Conference of Judicial Councils, and—most notably—the American Judicature Society have been strong forces which have advanced the movements for court control of procedure and for judicial councils to suggest reforms. In consequence the bar as a whole is now much more ready to share in a mass attack on judicial reform than at any previous time. The struggle for the passage of this Association's bill has seemed long and wearisome, but now that the bill has become a law we can see certain advantages in the delay. We are better equipped in every way to make the movement a success. Not only are the lawyers generally more accustomed to the possibility of changes in court administration, but there is much more unanimity of expert opinion as to the form of change which is desirable. Moreover, there has been a steady trend in the states, illustrated by the recent extensive reform in Illinois, to make improvements along like lines, roughly approximating the English model, so that now there is much more similarity in state procedure than ever before. In fact such has been the movement for reform that the federal system will be left behind that of even the average of the states unless it is now modernized.

In consequence we are now prepared for a quite unique development, which may set a standard for procedural reform in the future, namely, the invitation to the bar as a whole to participate in the work of drafting both by suggestions in advance and criticism after an initial first draft has been prepared. With the passage of the act in 1934, local committees were set up in the various federal districts. These committees worked hard and long, in some cases preparing complete codes, in all offering valuable suggestions. All the suggestions were considered with care by the Advisory Committee eventually appointed by the Supreme Court for the work of detailed drafting. Now at the suggestion of the Committee and with the approval of the Court, the bar has been invited to pass upon the draft before it. I know of no other comparable attempt to enlist such widespread participation in a work which, after all, is of a highly technical character. One could easily visualize its difficulties and the possibility that the scheme would be so far-flung as to break down of its own weight. It is probably unwise at this date to make too definite prophecies, but certainly I can speak with some enthusiasm of the results up to this time. It has succeeded in producing what seems to us, as we read the comments, to be almost unanimity of opinion on general purposes and objectives and a crystallization of suggestions as to details which had hardly seemed possible.

In the time available I cannot engage in detailed consideration of the rules. Nor do I believe

it necessary or desirable to do so, for all our correspondence tends to indicate that the lawyers have carefully studied the preliminary draft. Moreover, in the July number of the American Bar Association Journal I enumerated what seemed to me the important features of the draft and will not repeat the comments made there. Perhaps it would be more interesting to you if I tried to show a little what the democratic participation in code making to which I have referred has actually meant to us in the way of suggestions for our work. In this connection it may also be of some interest to contrast some of the theoretical problems which seemed to face us in working toward a uniform and united federal procedure and the practical details which now actually engage the attention of lawyers. Contrast between theory and practice always seems instructive.

Let me say, first, that the comments show almost universal approval of the general plan disclosed in the preliminary draft. Here, too, I may be jumping at conclusions too hastily; this opinion may need revision even before nightfall today, for certainly the title of Judge Finch's forthcoming address sounds portentous. Even as I wrote there came in from a Southern district committee a vigorous appeal for old-fashioned conformity. This committee had apparently overlooked the yearly reports to this Association of the Committee on Uniform Judicial Procedure and the fact that in practice no true conformity was achieved, but only several diverse systems, made possibly even more confusing by the approach to the code union of law and equity in the federal courts since the passage of the Law and Equity Act of 1915. It also neglected the enabling Act of 1934 and the Supreme Court's decision announced a year ago to proceed under it. But such objections are unusual. The usual response of a correspondent is, before he proceeds to his comments on details, to state his hearty support of the basic principles of the draft.

When our task was first contemplated, the problems theoretically at least seemed to center about the uniting of the law and equity procedures, the securing of extensive joinder of parties and of joinder of claims and of a general flexible system of pleading—what perhaps many of the lawyers think of as a "loose" system—and finally about developing rules of discovery and summary judgment. In fact these are the points of pleading reform most written about and most discussed in recent years by the scholars in the field. In justice to them, however, it should be pointed out that they were carrying the burden of showing the need for change from the older formalistic and particularistic systems. For the most part, they were necessarily advocates, not critics of code provisions embodying the changes. Nevertheless, there have been learned articles in the law reviews, even after the general outline of the work had been developed, and there have been suggestions as to the draft itself from textwriters, which have still expressed concern about some at least of these problems. Apparently from the standpoint of the practicing lawyers, however, there is little concern, so little as to be surprising, about these matters, except as to details. Thus, the principle of the union of law and equity is, with the limited exception mentioned, accepted without question. Some query has been made, however, as to the waiver of jury trial, though the code experience has shown that the lack of adequate waiver provisions is the one rock upon which the united procedure may founder in a wave of judicial technicalities and the provisions of the draft are in line with state experience and are valid under constitutional provisions fully as drastic as those of the Seventh Amendment. Again, the provisions on joinder of parties, adapted from those of England, New York, New Jersey, California, and Illinois, seem to meet general approval. Comparatively no objection has been raised to the general principle of the discovery and summary judgment procedures; the questions here have related to the extent of discovery permitted in certain situations. As was to be expected, some queried the very wide joinder of claims allowed, including provisions for free amendment or counter-claiming; and some questioned the freedom of pleading permitted; though the majority seemed to accept these ideas with equanimity and often distinct approbation. It seems not too much to say that the apprehensions felt by the experts as to the innovations appear to be shared by only a limited part of the bar.

Now what did particularly interest the bar? Very clearly it was the matters with which they will be compelled to struggle in their day-to-day practice. Of overwhelming interest were the problems raised by Rules 3 and 6 of the draft concerning the commencement of suit, service of summons, and the service and filing of the complaint and the pleadings. There is hardly a correspondent but has some definite and vigorous opinion here. This is only natural, for this rule may upset customary habits. It should be noted, however, that, if some agreement can be reached on any one of the several systems widely in vogue in this country, the general principles of the uniform procedure which is our objective will readily be secured. I have little concern about any of these systems, and cannot avoid some feeling of surprise that rules long in vogue in great states such as New York and Minnesota can be so subversive of justice as seems often to be feared or expected. Once settled and accepted, however, I am sure the lawyers will be surprised at the ease with which adjustment here can be made. A definite rule is necessary; the form of it, I venture to assert, has been given an importance it hardly deserves.

Next to this question the one which seems to have loomed largest in the minds of the lawyers is in connection with appeals. Here, too, there has been, as might be expected, much diversity of point of view, for there is not yet general agreement upon a proper form of appellate practice. A few approve of the present federal system and question the Committee's power in the premises. (I have discussed elsewhere the reasons why it is believed that the Supreme Court has power to promulgate these particular rules.) Mostly, however, the lawyers seem to regard the present system as unnecessarily complicated, though there is disagreement as to the changes which should be made. It may be noted that the Supreme Court in its recently promulgated rules for appeals in criminal cases has gone far toward simplification and has set up what we believe is a model which should be followed in civil cases. It is true that adoption of the Committee's present suggestions by the Court without re-

vision of its own procedure on appeal will, as the Committee has pointed out, leave a lack of uniformity in federal appeal practice; but if the Court has gone that far in approving and extending the principle of the rules it has already adopted in criminal cases, it would seem not averse to making such revision. As to the form of the record, it appears that there is much suport for the practice in vogue in some of the Western states of a very simple system of appeal without the formality of a printed record. That system, which is described in the Committee's Note to its Rule 74, may well become the general form of appeal in this country, with undoubted gains of simplicity, expedition, and lack of expense, though possibly it is too early yet to be accepted for the federal system.

One important detail in this connection has aroused much debate, namely, the provision of Rule 68 that findings of the court should have the same effect as that heretofore given to findings in suits in equity. That matter is to be discussed later today, and since I was in the minority when this provision was decided upon, probably I should say nothing here. I cannot refrain from suggesting, however, that the arguments made by members of the bar—and well stated by Judge Chesnut in his thoughtful article in the A. B. A. Journal for August—are weighty and I am hoping that my colleagues of the Committee will now be ready at least to suggest an alternative rule for the choice of the Court. We are all agreed that there should be no distinction between findings in jury-waived and in equity cases; or else we would resurrect for purposes of appeal the divided procedure which it is our aim to bury. My colleagues felt the complete equity review of both law and facts was the rule to be now extended to the other cases, but I feel with many members of the bar that the present rule in jury-waived cases, limited to review of law but not of the facts which are supported by the evidence, is the preferable one, since it provides uniformity in all cases (including jury cases where no other review is possible under the Constitution), it gives all the power needed for the correction of errors and is in substance not different from that actually now applied in the equity cases, and it does not invite useless appeals. But I fear I have said too much on this debated point.

A final matter which is cause for discussion has been the wide extent of some of the discovery rules, and some fear has been expressed whether opportunity would not be given plaintiffs to indulge in fishing expeditions to build up otherwise unsustainable claims. This matter, too, will be discussed later today. I will only suggest that, if there is any advantage at all, it seems to me to be in favor of defendants, who by acting promptly may discover the nature of the plaintiff's case and the testimony to support it at once in such a way that the plaintiff cannot thereafter shift his ground and the defendant may know just what it has to meet. In actual practice, if defendants avail themselves of the device it is more likely to discourage fishing expeditions than otherwise, an opinion which I find shared by defendants' lawyers from Missouri, where the rule has been found effective. It is not unfair to plaintiffs, for one with a really good case has nothing to conceal, but it does make it impossible for a would-be dishonest litigant to wait for the trial and shape his evidence according to the exigencies of his case.

Were time available I could go on to further details, such as matters of dismissal of suits, direction of verdicts—a problem complicated by the current construction of the constitutional right of jury trial—provisional remedies, evidence, and so on, but these matters, while they have elicited enlightening comments, have not called forth the amount of discussions as have the rules mentioned. I think you will agree, from the nature of the matters discussed by the bar and their general and practical character, that the lawyers have been alive to the problem of day-to-day application of the rules. But the very fact that they have picked out these provisions as deserving of the most extended discussion justifies us, I believe, in thinking that we have at least achieved a proper framework for the erection of a new procedure and that there is good reason for feeling encouraged as to the ultimate success of the proposed reform at the hands of the bar itself.

Before I close I do wish to make two suggestions. The first is made because the lawyers universally, and as is only natural, have favored the adoption in the federal courts of their own local practice. But one of the problems to be faced is the wide diversity of conditions existing in different parts of the country and rules must be adjusted to accommodate themselves to that diversity. Rules suitable for metropolitan areas where your opponent as counsel has his offices in the same building and the federal judge is just around the corner may create hardship where the federal judge travels all over a large state or sits in seven different places, or the clerk's and marshal's offices are in one corner of the territory served. The expenses of fees of travel and the delay in procuring orders under the latter conditions may indicate the desirability of a procedure wherein counsel himself may keep the case advancing steadily towards judgment without too general reliance on the official staff of the court.

The second suggestion is that perhaps the most important rule of all, from the longer view, is not contained in the regular draft at all, but only as a supplement to it. I refer to the rule providing for a standing advisory committee on civil procedure. Our Committee felt it could with propriety only call attention to the use of such a committee. But this Association can, if it will, press vigorously for it. Experience in rule-making shows its absolute necessity. If it exists, the mistakes we are making may be corrected easily and simply as they appear. Otherwise, they may remain for years to haunt us and trouble the profession.

(*Continued on page* 809)

Signed Articles

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view by the fact of publication, that the subject treated is one which merits attention.

AMERICAN BAR ASSOCIATION JOVRNAL

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JOSEPH R. TAYLOR
MANAGING EDITOR
Journal Office: 1140 N. Dearborn Street
Chicago, Illinois

A NOTABLE EVENT

The House of Delegates is to hold its first mid-winter meeting in Columbus, O., beginning on January 5.

This will be a notable event and one which will doubtless attract the attention of the entire profession. The House met at Boston, it is true, and gave a good illustration of what a small and efficient representative body can do. But it met in the familiar atmosphere of an annual meeting, and it fitted so quickly and easily into its place and work, that many members perhaps did not realize the fundamental change that had taken place in the organization of the Association.

At Columbus it will hold the center of the stage. The meeting will give special emphasis to the fact that for the first time in the history of the legal profession in the United States there is in existence a thoroughly representative body whose members are the chosen delegates of a majority of American lawyers. This is due to the fact that representatives of the State Bar Associations and the larger local Bar Associations, as well as of affiliated organizations of lawyers, will be members of the House and have the right to pass on the policies of the Association.

Under the new Constitution, these Associations may choose their delegates in the way they deem best. Since the adjournment of the Boston meeting a number of them have acted. Some have chosen their delegates by election in open meeting, while others have given the power of appointment to the Board of Governors or the President. Doubtless others will be named before the House meets at Columbus. Under the new constitution, the President will represent the Association in the absence of an earlier action by that body.

The mid-winter meeting of the House of Delegates will also emphasize the continuity of the activities of the Association. In his addresses President Stinchfield is calling attention to the self-sacrificing work that is constantly being done throughout the entire year by the numerous committees and the sections of the Association—work which puts the entire profession under a real obligation. Few lawyers realize what is accomplished in the "fruitful silences" between Annual Meetings. The Columbus meeting will break the silence and furnish the evidence of an organization constantly in action.

THE ASSOCIATION'S REVISED BIRTHPLACE

It is a matter of curious interest, and perhaps not without some esoteric significance, that the year which witnessed the remodeling of the American Bar Association also witnessed the remodeling of the old Town Hall at Saratoga Springs, N. Y., the birthplace of the Association.

Judge Goldsmith has written us about it and his letter is published in this issue along with a picture of the Town Hall as it stood in 1878 and one as it stands today in its revised and amended form. Judge Goldsmith's letter, however, lacks certain details which would enable us to determine how far the movement for the revision and amendment of the Town Hall furnished an analogy to the movement for a change in the organization which took form and being under its roof.

He makes no reference, for instance, to a spirited campaign for the purpose of acquainting those supposed to be interested in the matter with the absolute necessity for changes in order to enable the Town Hall to discharge its full duty to the public. There is no reference to an extraordinary meeting at which the proposals for architectural revision were at last finally adopted amid scenes of genuine enthusiasm. We may assume, however, that there was at least a reasonable amount of agitation on the subject, for the revision even of a Town Hall to adapt it more fully to modern conditions does not usually come by chance.

Still, certain details seem suggestive. The removal of the fence between the building and the street indicates an abandonment of a certain exclusiveness which a fence always indicates, and which has even been charged against the Association itself under its old plan of organi-

Revised and Amended Town Hall, Saratoga Springs, New York

Below: Old Town Hall Where Association Was Organized

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

You may recall that some years ago, when the American Bar Association was celebrating an anniversary, I sent you for publication, a picture of the City Hall of Saratoga Springs, formerly known as the Town Hall, which was the birth place of the Association.

During the past year the old building has been remodelled and rehabilitated. The clock tower was found to be unsafe and was removed. The old entrance was changed and the fence between the building and the street was taken down. You will notice from the photograph that there were two brass lions guarding the entrance to the building. These have been taken away and probably this feature of the remodelling caused more controversy in the City of Saratoga Springs than any event that has occurred in a long time. There were a large number of citizens who believed that these lions were real landmarks and protested strongly against their removal. However, they were taken away although they have not been destroyed. One lion is in storage and the other is the center of a wading pool constructed by the local Lion's Club at the recreation grounds.

The interior of the building has been entirely made over and provides a very handsome and convenient group of offices for City and County officials.

Sincerely,

IRVING I. GOLDSMITH

Saratoga Springs, N. Y.

zation. The removal of the clock tower, which had become unsafe, was of course simply a practical step intended to afford greater protection to the public—the sort of measure which the Committee on Unauthorized Practice of the Law will fully understand and approve. The relegation to other quarters of the brass lions guarding the entrance of the building seems harder to justify and it evidently struck many citizens as a wanton and unnecessary break with the past. But a more realistic approach to the building was perhaps suggested to the authorities by the realistic tendencies which are manifesting themselves in the field of legal scholarship.

We note that the Town Hall rests on its original foundations, which was doubtless a wise arrangement. In this respect, the architectural revision falls somewhat behind the changes instituted by the American Bar Association which, as is well known, has greatly broadened and strengthened its foundations.

HOUSE OF DELEGATES TO HOLD MID-WINTER MEETING IN COLUMBUS, OHIO

An Important Event in Association History—January 5 Set as Date in Call Issued by President Stinchfield and Chairman Morris—State Delegates Called to Consider Question of Nominating Officers—Board of Governors Also to Meet in Ohio City—Provisional Roster of Members of House

AN important event in the history of the Association will be the first mid-winter meeting of the recently created House of Delegates. It will be held at Columbus, O., beginning at 2 P. M. on Tuesday, Jan. 5, 1937. Following is the official notice of the meeting which was sent out to the members of the House:

To the Members of the House of Delegates of the American Bar Association:

In accordance with the determination of the Board of Governors, a meeting of the House of Delegates of the American Bar Association has been fixed to begin at two o'clock P.M. on Tuesday, January 5, 1937, at the Deshler-Wallick Hotel, Columbus, Ohio. It is expected that the business of the meeting will be completed on Thursday, January 7.

The agenda for the meeting will be distributed soon to the members of the House. A purpose of the present notice is to allow the members to make their engagements for January in accordance with this advice.

FREDERICK H. STINCHFIELD,
President, for the Board of Governors,
and
GEORGE M. MORRIS,
Chairman of the House of Delegates.
October 17, 1936.

There will also be a meeting of the State Delegates of the American Bar Association. George M. Morris, Chairman of the House, has sent out the following call:

To the State Delegates of the American Bar Association:

In accordance with the determination of the Board of Governors, a meeting of the State Delegates of the American Bar Association has been fixed to begin Tuesday morning at nine o'clock on January 5, 1937, at the Deshler-Wallick Hotel, Columbus, Ohio.

At that meeting the nomination for officers of the Association, as prescribed by the Constitution, will be made, or if that meeting prefers, the nominations will be made at an adjourned meeting.

GEORGE M. MORRIS,
Chairman of the House of Delegates.
October 17, 1936.

A meeting of the Board of Governors has also been called for Monday, June 4, at 10 o'clock A. M., at the Deshler-Wallick Hotel. It is signed by President Stinchfield, who observes incidentally that "there is, perhaps, more wisdom available when all the members of the Board are present."

The provisional roster of the present membership of the House of Delegates follows. It is the provisional roster at the close of the Boston meeting, with such additions and changes as have been made since that date. These additions and changes will of course have to be passed upon by the Credentials Committee at Columbus and will be subject to their rulings.

PROVISIONAL ROSTER OF THE HOUSE OF DELEGATES OF THE LEGAL PROFESSION

THE OFFICERS OF THE ASSOCIATION

The President

FREDERICK H. STINCHFIELD, of Minnesota.

The Chairman of the House of Delegates

GEORGE MAURICE MORRIS, of the District of Columbia.

The Secretary

HARRY S. KNIGHT, of Pennsylvania.

The Treasurer

JOHN H. VOORHEES, of South Dakota.

THE BOARD OF GOVERNORS

The Officers of the Association.

The Last Retiring President of the Association, WILLIAM L. RANSOM, of New York.

The Editor-in-Chief of the American Bar Association Journal, EDGAR B. TOLMAN, of Illinois.

Elective members:

First Circuit: LOUIS E. WYMAN, of New Hampshire.
Second Circuit: WALTER S. FENTON, of Vermont.
Third Circuit: ARTHUR T. VANDERBILT, of New Jersey.
Fourth Circuit: JAMES H. CORBITT, of Virginia.
Fifth Circuit: L. BARRETT JONES, of Mississippi.
Sixth Circuit: NEWTON D. BAKER, of Ohio.
Seventh Circuit: FRANK T. BOESEL, of Wisconsin.
Eighth Circuit: JACOB M. LASHLY, of Missouri.
Ninth Circuit: CHARLES A. BEARDSLEY, of California.
Tenth Circuit: ROBERT STONE, of Kansas.

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JEFFERSON P. CHANDLER, of California.
OWEN CUNNINGHAM, of Iowa.
SCOTT M. LOFTIN, of Florida.
E. SMYTHE GAMBRELL, of Georgia.

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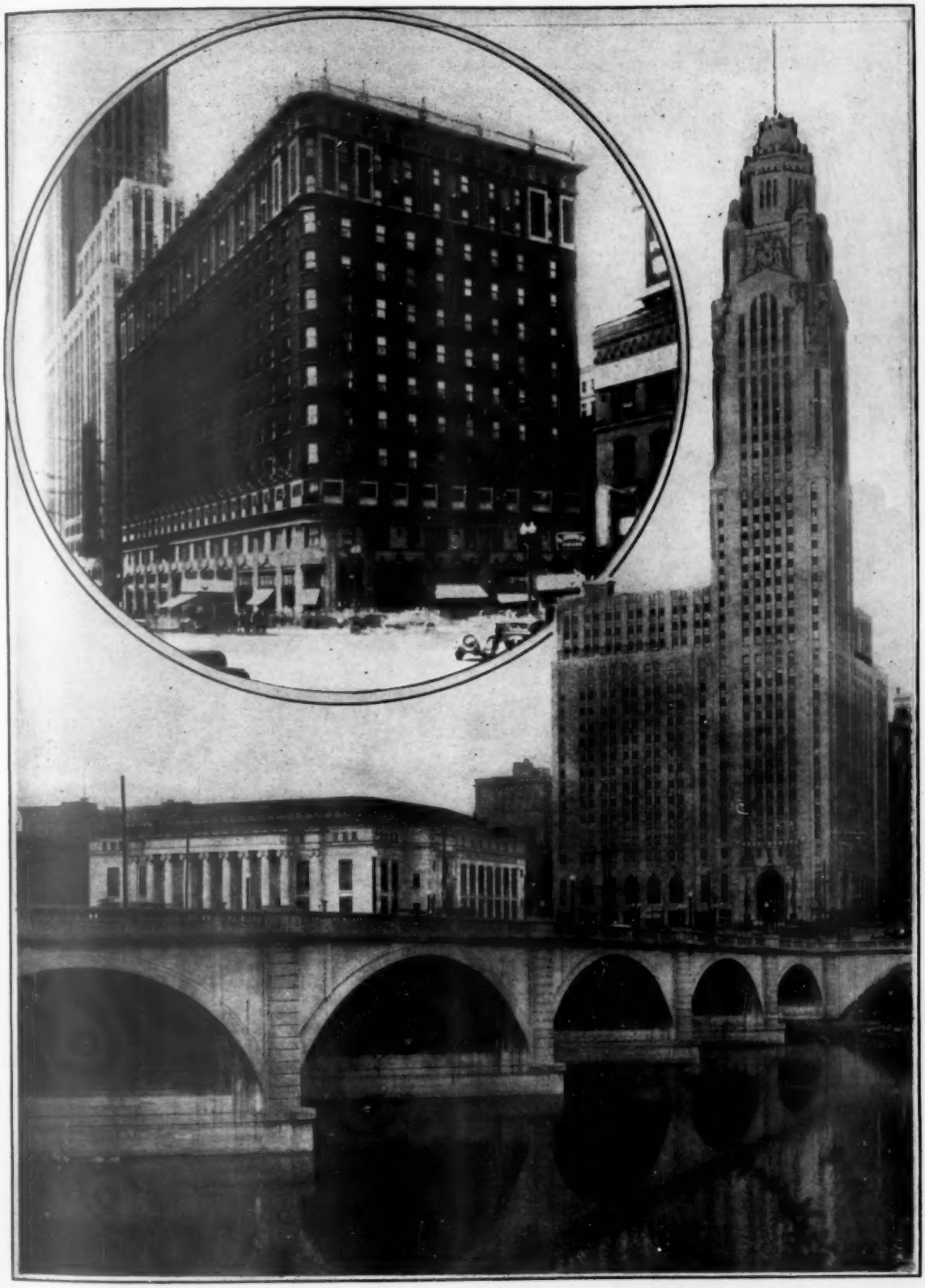
ARIZONA	J. EARLY CRAIG.
ARKANSAS	WILLIAM H. ARNOLD.
CALIFORNIA	GUY RICHARDS CRUMP.
COLORADO	G. DEXTER BLOUNT.
CONNECTICUT	JOSEPH F. BERRY.
DELAWARE	JAMES R. MORFORD.
DISTRICT OF COLUMBIA	GEORGE MAURICE MORRIS.
FLORIDA	FRANCIS P. FLEMING.



AT TOP: DESHLER-WALLICK HOTEL AT COLUMBUS, WHERE HOUSE OF DELEGATES WILL MEET. BOTTOM: CITY ADMINISTRATION BUILDING AND (AT RIGHT) INSURANCE CITADEL OF AMERICA.

GEORGIA	JOHN M. SLATON.
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IDAHO	OLIVER O. HAGA.
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INDIANA	ELI F. SEEBIRT.
IOWA	THOMAS J. GUTHRIE.
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MARYLAND	T. SCOTT OFFUTT.
MASSACHUSETTS	GEORGE R. GRANT.
MICHIGAN	JOHN M. DUNHAM.
MINNESOTA	MORRIS B. MITCHELL.
MISSISSIPPI	WILLIAM H. WATKINS.
MISSOURI	JOHN T. BARKER.
MONTANA	RAYMOND T. NAGLE.
NEBRASKA	FREDERICK S. BERRY.
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NEW HAMPSHIRE	LOUIS E. WYMAN.
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NEW MEXICO	GEORGE S. KLOCK.
NEW YORK	GEORGE H. BOND.
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OREGON	SIDNEY TEISER.
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RHODE ISLAND	JAMES C. COLLINS.
SOUTH CAROLINA	GEORGE L. BUIST.
SOUTH DAKOTA	LEWIS BENSON.
TENNESSEE	EARL KING.
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UTAH	GEORGE H. SMITH.
VERMONT	WALTOR S. FENTON.
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WEST VIRGINIA	DOUGLAS W. BROWN.
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WYOMING	WILLIAM O. WILSON.

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(Constitution, Art. V, Sec. 6.)

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Baltimore Bar Association	BURDETTE B. WEBSTER.
Chicago Bar Association	CHARLES M. THOMSON.
San Francisco Bar Association	ARTHUR W. BROUILLET.
St. Louis Bar Association	MR. FORREST DONNELL.
Bar Association of the City of New York	CHARLES H. STRONG.

DELEGATES PURSUANT TO CONSTITUTION, ARTICLE V, SECTION 3

The President of the National Conference of Commissioners on Uniform State Laws—ALEXANDER ARMSTRONG, of Maryland.

The Chairman of the National Conference of Bar Examiners—JOHN H. RIORDAN, of California.

The Chairman of the National Conference of Judicial Councils—ARTHUR T. VANDERBILT, of New Jersey.

The President of the Association of American Law Schools—GEORGE GLEASON BOGERT, of Illinois.

The Attorney-General of the United States—HOMER S. CUMMINGS, of Connecticut.

The Solicitor-General of the United States—STANLEY REED, of Kentucky.

The President of the National Association of Attorneys-General—CLYDE R. CHAPMAN, of Maine.

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(Constitution, Art. V, Sec. 7.)

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The American Judicature Society—NEWTON D. BAKER, President.

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Public Utility Law—ELMER A. SMITH, of Illinois.

Bar Organization Activities—MORRIS B. MITCHELL, of Minnesota.

(*Continued on page* 803)

IMPORTANT CASES PENDING BEFORE THE SUPREME COURT

SINCE no opinions have been rendered by the Supreme Court during the new term, there is substituted for the customary Review of the Supreme Court Decisions a survey of the more important and interesting of the pending cases, and of the disposition of some of the petitions for certiorari, and other current business.

New Deal Cases

It will be recalled that the provisions of the so-called Municipal Bankruptcy Act were adjudged unconstitutional late in the last term, by a divided bench, as an unconstitutional encroachment on the powers reserved to the States. A petition for rehearing, supported by briefs of ten States as *amici curiae*, has been denied. *Ashton v. Cameron County Water District No. One*, No. 859.

The power of Congress to appropriate money by loan and grant for the construction of a municipal power plant to compete with a private power company is involved in the *Duke Power Company Case*, No. 32. The question arises in a challenge to a loan and grant by the Public Works Administrator to Greenwood County in South Carolina. The Power Company contends that the provisions of Title II of the National Industrial Recovery Act, authorizing the loan and grant, are invalid.

The constitutionality of the Second Frazier-Lemke Act, amending the Bankruptcy Act, for the relief of farmers has been challenged in several cases. Certiorari has been denied in *Phenix Joint Stock Land Bank v. Hotenspiller*, Nos. 120 and 121. No action has been taken in another pending case challenging the statute.

The application of the Gold Resolution to a rental contract is raised in *Holyoke Water Power Co. v. American Writing Paper Company*, No. 180. While the case has been the subject of considerable comment in the press, it is believed to involve no more than a question of interpretation of an unusual contractual provision. Certiorari has been granted in this case.

The Securities Act, 1933, has been the subject of attack, as to its constitutionality, by J. Edward Jones, but his petition for certiorari has been denied, No. 320, *Jones v. Securities and Exchange Commission*. Jones successfully challenged action by the Securities and Exchange Commission at the last term on procedural grounds, but no ruling was made on the validity of the Act itself.

Test of the constitutionality of the Public Utility Act of 1935 will probably be postponed until decision of the Federal District Court in New York, in the Electric Bond and Share case which is pending there on the Government's suit. The Supreme Court has granted certiorari in two consolidated cases, Nos. 221-2, *Landis et al. v. North American Co.;* and *Same v. American Water Works*, et al., involving the power of the trial courts to stay suits, pending the outcome of the Electric Bond and Share case. These cases have been placed at the head of the call and assigned for argument on November 9th.

Bankruptcy Cases

A good many bankruptcy cases were on the docket at the opening of the term. The most important of these involved questions under Section 77B, relative to corporate reorganizations. Litigation involving the Second Frazier-Lemke Act is referred to above.

Tennessee Publishing Company v. American National Bank, No. 48, involves a question whether Section 77B, providing for adjustment of claims, deprives non-assenting creditors of property without due process, when such creditors were vested with contractual rights to obtain a lien on property until the indebtedness was paid, and to have the mortgaged property devoted primarily to satisfaction of the debt. The case also presents the question whether the debtor's good faith in filing a plan of reorganization is to be tested by the honesty and sincerity of the debtor, or by the feasibility of the plan and the reasonable prospect of the debtor's rehabilitation. Certiorari has been granted in this case.

The necessity for the assent of junior lien holders to a plan of reorganization under section 77B, where the value of the property is less than the amount of the first mortgage, is raised in *620 Church Street Corporation*, No. 271. The Court has granted certiorari in this case.

Several cases involve questions as to lessor's claims for rent in 77B proceedings, for breach of surrender of leases, under Section 77B (10). No. 151, *Meadows v. Irving Trust Co.;* No. 260, *City Bank Farmers Trust Co. v. Irving Bank;* and No. 354, *Kuehner v. Murphy*.

State Minimum Wage Laws

A motion for rehearing in a case involving the New York Minimum Wage Law for women was denied. The Court will consider, however, a case involving the State of Washington Act prescribing minimum wages for women. This case is before the Court on appeal, and probable jurisdiction has been noted, No. 293, *Parrish v. West Coast Hotel Company*. It is understood that the theory to be urged in support of the statute is the same as that sought to be presented on the rehearing of the New York case.

It will be recalled that the New York statute, declared unconstitutional by a five to four decision at the last term, as an unreasonable interference with freedom of contract in violation of the due process clause, fixed two standards for the determination of minimum wages for women. It prescribed that the wage should be fixed at a living wage and should be not less than the fair and reasonable value of the services rendered. The Washington statute fixes standards which are "reasonable and not detrimental to health and morals," and "sufficient for the decent maintenance of women."

Labor Law

Several cases are on the Court's docket involving questions as to the validity, application and scope of the National Labor Relations Act. *Associated Press v. National Labor Relations Board*, No. 365, challenges the validity of the Act on the ground that it is beyond the powers of Congress under the commerce clause, and violates the Fifth Amendment.

Five cases were filed in the Supreme Court the week

prior to October 6, by the Labor Relations Board; No. 419, *Labor Relations Board v. Jones and Laughlin Steel Corporation;* Nos. 420-1, *Same v. Fruehauf Trailer Company;* Nos. 422-3, *Same v. Friedman-Harry Marks Clothing, Inc.* These cases involve relationships in production operations between employers and employees in the steel industry, automobile industry and clothing industry. In all of these the Circuit Court of Appeals have ruled adversely to the Labor Relations Board, largely upon the authority of the *Schecter Case,* 295 U. S. 495, and *Carter v. Carter Coal Company,* decided May 18, 1936.

Another case involving the same Act has just been docketed in an application for certiorari filed by the Washington, Virginia, and Maryland Coach Co., the Circuit Court of Appeals for the Fourth Circuit having sustained the Act in the circumstances, since the employer is engaged in interstate commerce.

In *Virginian Railway Co. v. System Federation No. 40, et al.,* No. 324, questions are presented as to the constitutionality and application of the Railway Labor Act, as amended in 1934, in its relation to backshop employees of interstate carriers. The principal question is whether such employees are engaged in interstate commerce. Certiorari has been granted in this case.

Trade Law

The extent of the power of the states to regulate trade practices will be tested in suits attacking the Fair Trade Act of California and the Fair Trade Act of Illinois. *Pep Boys, Mannie, Moy & Jack of Cal. v. Pyroil Sales, Inc.,* No. 55; *Kunsman v. Max Factor & Co.,* No. 79; and *Old Dearborn Distributing Co. v. Seagram Distillers Corp.,* No. 226. Certiorari has been granted in the first two of these cases, while no action has yet been taken on the third.

Pick Manufacturing Co. v. General Motors Corporation, No. 12, presents a question as to whether contracts requiring automobile dealers to use and sell only manufacturer's replacement parts constitute a monopoly in retraint of trade. Certiorari has been granted in this case.

Taxation

Four cases on the docket involve problems of taxation of a governmental instrumentality. *British-American Oil Co. v. Board of Equalization,* No. 37, concerns taxation of an oil producing company having an oil and gas lease in the Black Foot Indian lands with a trust patent reserving oil to the United States, as trustee for the Indians. Query whether the company is exempt from state taxation?

People ex rel Rogers v. Graves, No. 139, presents the question whether the State of New York may levy an income tax on the salary of an officer of the Panama Railroad; whether it is a governmental instrumentality, and, if it is, whether it is engaged in a private undertaking of commercial character.

Three stamp tax cases, *U. S. v. Automatic Washer Co.,* No. 330, *U. S. v. A. B. Leach & Co.,* No. 331, and *Founders General Corp. v. Hoey, Collector,* No. 393, involving the use of nominees are on the docket. In the first two of these certiorari has been granted. They all present the question whether a taxable transfer of a "right to receive securities" has occurred when under varying circumstances a corporation had directed that its subscribed or exchanged securities be delivered in the name of its nominee. These cases, if decided in favor of the Commissioner of Internal Revenue, will undoubtedly limit the now popular use of nominees as holders of securities. They may also throw light, if the Supreme Court discusses the general nominee problem, upon some of the legal aspects of nominee partnerships.

Nos. 161 and 163, *Liggett & Myers Tobacco Co. v. United States,* involve the problem of exemptions from the federal excise on tobacco sold by manufacturers to the State of Massachusetts, for free distribution in state hospitals, on the ground that the hospital is a state instrumentality. Certiorari has been granted in this case.

Taber v. Indian Territory Illuminating Oil Co., No. 280, relates to the question of exemption from state taxation of personal property used by the lessee of restricted Indian lands, on the theory that it is a federal instrumentality.

Valentine v. Great Atlantic & Pacific Tea Co., Same v. Graham Department Stores, Same v. Walgreen Co., Nos. 13, 14, and 15, raise questions as to Iowa chain store taxes, and whether they violate the equal protection clause. These cases have all been argued.

Banks

Chisholm v. Gilmer, No. 11, involves the liability of national bank directors who have subscribed through a trustee for stock in a national bank. The question presented is whether they are jointly liable for assessments, or individually liable to the amount of their respective investments.

Mechanics Universal Joint Co. v. Culhane, No. 17, involves the question of looking through the corporate veil. While a national bank was insolvent, and one day before it closed its doors, payments were made to a corporate depositor whose president was a director of the insolvent bank. Questions are raised as to the rights of recovery and counterclaim.

Miscellaneous

No. 16, *Loporto v. Druiss Co.* involving the constitutionality of the New York Mortgage Moratorium law was on the calendar for argument during the week of October 19, but the appeal has been dismissed on stipulation.

United States v. Wood, No. 34, raises a constitutional question as to the validity of the Act of August 22, 1935, providing that government employees may serve as jurors in the District of Columbia, although the government itself is a party to the litigation. This case was on the day calendar for October 19, 1936.

Chamberlain, Inc. v. Andrews, Stearns Co. v. Same, Associated Industries of New York State, Inc. v. Department of Labor, Nos. 49, 50 and 64, raise questions as to the constitutionality of a New York Unemployment Compensation Law, and as to whether it violates the due process clause of the Fourteenth Amendment. The legislation challenged is interrelated with the Federal Social Security Act.

United States v. Curtis Wright Export Company, No. 98, brings up the very important question of whether the Joint Resolution of May 28, 1934, granting the President power to prohibit the export of munitions if he finds that such provision will contribute to the re-establishment of peace constitutes an unconstitutional delegation of legislative power. The decision in this case will be of importance in drafting of the statutes proposed for the next session of Congress for the purpose of taking the profits out of war.

THE NEED FOR REVISION OF THE ANTI-TRUST LAWS

Outstanding Decisions of Supreme Court of the United States for the Last Ten Years Support the Conclusion That the Law Is Sufficiently Elastic to Meet Changing Economic Conditions and Yet Is Sufficiently Drastic to Prevent Combinations in Restraint of Interstate Commerce, under Our Competitive System—Serious Defects in Committee's Proposed Act —Recommendation for Change in Character of Federal Trade Commission, etc.

By Hon. William J. Donovan
Member of the New York Bar

I.

I HAVE been asked to discuss the need of amending our anti-trust laws. As a basis for that discussion your Committee has furnished me with a draft of a bill designed to revise the anti-trust laws in certain particulars.

When we speak of our anti-trust laws we refer primarily to the Sherman Law. That statute arose from the fear of Congress that our competitive system was in danger of destruction. It embodies the principle of competition upon which our American civilization was largely built. We have realized, however, that competition is not a self-operating mechanical concept. We know that it may be carried to extremes. That all competition is not good and that it may produce results dangerous to economic society. The recognition of these dangers has caused us to introduce certain exceptions in our enactment of laws. Whenever we have departed from that principle, however, it has always been justified upon the ground that the industry is no longer a private industry but one affected with the public interest which impels more stringent governmental regulation.

The Supreme Court has said that,—"As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to promote competition upon a sound basis. . ."[1]

With these general statements of purpose few disagree. But there is criticism of the practical results achieved under the Act over a period of approximately forty-six years. On one side it is said that in actual operation the Sherman Act does not reach industrial abuses at their inception; that it is so uncertain in its definition of what is permissive and what is condemned under the law that its enforcement is impractical. On the other it is said that the language of the Act is so indefinite in its description of that which is forbidden that business men are unable to avoid its violation and that it operates to prevent industry by cooperative effort from dealing effectively with the evils resulting from over-production and price-wars.

II.

In the light of these criticisms it might prove helpful to this Committee if we examine briefly the outstanding decisions of the past ten years of the Supreme Court of the United States interpreting this Act. Such examination may indicate whether there is need for substantive change in the law or whether what is needed is administrative reform in order to provide not only for vigorous but intelligent enforcement of the law.

During the past ten years eighteen cases instituted by the Department of Justice under the Sherman Act reached the Supreme Court of the United States.[2] The decisions in fourteen of these cases were favorable to the Government. In only four cases were the alleged illegal combinations sustained. Assuming that these latter cases would show the weakness of the law, let us briefly inquire into three of them—The *Harvester*, *Appalachian*, and *Standard Oil* cases.

A—In *United States v. International Harvester Co.*, 274 U. S. 693 (1927), the Supreme Court refused

*Address delivered at the Open Forum Discussion of "The Need for Revision of the Anti-trust Laws," at a meeting of the Committee on Commerce of the American Bar Association held in Boston on August 26, 1936, Chairman Harold J. Gallagher, of New York, presiding.

1. *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 360 (1933).

2. *United States v. General Electric Co.*, 272 U. S. 476 (1926); *United States v. Brims*, 272 U. S. 594 (1926); *United States v. Trenton Potteries*, 273 U. S. 392 (1927); *United States v. Sisal Sales Corp.*, 274 U. S. 268 (1927); *United States v. Int. Harvester Co.*, 274 U. S. 693 (1927); *Swift & Co. v. United States*, 276 U. S. 311 (1928); *Brown v. United States*, 276 U. S. 134 (1928); *United States v. Goldman*, 227 U. S. 229 (1928); *United States v. California Canneries*, 279 U. S. 553 (1929); *Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30 (1930); *United States v. First National Pictures*, 282 U. S. 44 (1930); *Standard Oil Co. v. United States*, 283 U. S. 163 (1931); *Appalachian Coals, Inc. v. United States*, 288 U. S. 344 (1933); *Local 167 v. United States*, 291 U. S. 293 (1934); *Atlantic Dyers & Cleaners v. United States*, 286 U. S. 427 (1932); *United States v. Swift & Co.*, 286 U. S. 106 (1932); *Sugar Institute, Inc. v. United States*, 297 U. S. 553 (1936); *Inter. Business Machines, Inc. v. United States*, 298 U. S. (1936).

to order the dissolution of the International Harvester Company.

The record before the Court in that case disclosed that in a prior proceeding the International Harvester Company had been adjudged a combination in restraint of trade. A consent decree had been entered enjoining certain of its practices and reserving to the Government the right to apply to the Court for further relief in the event that competitive conditions should not be reestablished under the decree. In accordance with this provision of the decree, the Government had filed a petition in equity alleging that competitive conditions had not been reestablished under the decree and asking that the International Harvester Company be divided into several distinct corporations.

The size of the combination was impressive. The Harvester Company sold approximately 64 per cent of all the harvesting machines sold in the United States. In other fields it enjoyed an even greater percentage of the business. But in spite of its tremendous size and power, there was evidence before the Court that under the restrictions of the decree previously entered and still in effect, competitors were in a position to meet the competition of the International Harvester Company. Since the test of monopolistic power is not the size of the assailed combination but the competitive vitality of its business rivals, the Supreme Court determined that under the existing decree the public was amply protected against any abuse of power by the Harvester Company.

It was also urged upon the Court in that case that the combination was illegal because its great size necessarily induced competitors to follow the prices established by the International Harvester Company. It was argued that this fact made price competition an impossibility. In this connection the Supreme Court observed that under the decree the Harvester Company had not attempted to dominate and in fact had not controlled or dominated the harvester machinery industry by the compulsory regulation of prices. It concluded that, ". . . the fact that competitors may see proper, in the exercise of their own judgment to follow the prices of another manufacturer does not establish any suppression of competition or show any sinister domination" (pp. 708, 709).

It has been said that this language opens the way for business to flaunt the Sherman Act; that under the guise of following the prices established by the leader a price-fixing agreement could be accomplished. An agreement or understanding to follow the price lead of a competitor is unequivocally condemned by the law. And the recent decision in the *Sugar Institute* case[3] shows that the Court can find it possible to go beyond mere protestation of lawful purpose and ascertain the facts.

The same test was applied by the Court in *Appalachian Coals, Inc. v. United States*, 288 U. S. 344 (1933). There the Supreme Court upheld the legality of an agreement among 137 producers of bituminous coal in the Appalachian territory to form a corporation to act as the exclusive selling agency of the producers and to vest in that selling agency the authority to set prices.

It appeared that the controlling purposes in the formation of the exclusive selling agency were: (a) by better methods of distribution and intensive advertising to increase the sale of coal in competition with electricity and gas, (b) to achieve economies in the production and sale of coal,[4] and (c) to eliminate certain abnormal competitive practices which threatened to drive many of the producers into bankruptcy.

The companies which formed Appalachian Coals, Inc. produced approximately 73 per cent of all the coal produced in the territory in which their mines were located. It appeared, however, that this territory was not a large consumer of coal. On the contrary, the great bulk of the coal there produced was sold in highly competitive markets located on the Eastern Seaboard and in the territory surrounding the Great Lakes. The Court found that the price of coal to be charged in the producing area was largely determined by the price set in these large competitive consuming markets. The fact that the defendants produced a large percentage of coal in a particular producing area did not, therefore, show any power or purpose to control the price in any market.

In sustaining the legality of this arrangement the Court merely applied a general doctrine frequently stated, *i. e.*, that an agreement among competitors in the same branch of industry for the purpose of promoting efficiency and economy, even though it restricts the competition formerly existing between the parties, is not prohibited by the Sherman Act unless (a) an intent to restrain or monopolize the commerce concerned is implied from the character of the acts or from the circumstances surrounding the transaction, or (b) by reason of its inherent nature the consolidation will have the direct or necessary effect of restraining or monopolizing that commerce.

But it was urged upon the Supreme Court by the Government that this doctrine had application solely to corporate mergers and consolidations and that it should not be extended to combinations in other forms. The rejection of this argument was fundamental to the decision of the Supreme Court. It again points out that the inhibitions of the Sherman Act are concerned with substance and not mere form,—

". . . We agree that there is no ground for holding defendants' plan illegal merely because they have not integrated their properties and have chosen to maintain their independent plants, seeking not to limit but rather to facilitate production. We know of no public policy, and none is suggested by the terms of the Sherman Act, that, in order to comply with the law, those engaged in industry should be driven to unify their properties and businesses, in order to correct abuses which may be corrected by less drastic measures. Public policy might indeed be deemed to point in a different direction. If the mere size of a single, embracing entity is not enough to bring a combination in corporate form within the statutory inhibition, there mere number and extent of the production of those engaged in a cooperative endeavor to remedy evils which may exist in an industry, and to improve conditions, should not be regarded as producing illegality. The argument that integration may be considered a normal expansion of business, while a combination of independent producers in a common selling agency should be treated as abnormal—that one is a legitimate enterprise and the other is not—makes but an artificial distinction. The Anti-Trust Act aims at substance. . . The question in either case is whether there is an unreasonable restraint of trade or an attempt to monopolize. If there is, the combination cannot escape because it has chosen corporate form; and if there is not, it is not to be condemned because of the absence of corporate integration . . ." (pp. 376, 77).

The decision in the *Appalachian Coals* case also shows the elasticity of the Sherman Act. Such elas-

3. *Sugar Institute Inc. v. United States* (March 30, 1936).

4. The cost of producing coal decreases with increased running time. Consequently it was expected that increased sales would achieve substantial economies.

ticity in a restrictive statute of this kind is vitally necessary if it is to meet changing economic conditions and practices in succeeding decades. A mere mechanical statutory inhibition would have denied to small independent business units the advantage of cooperative effort. A less resilient statute would have compelled the small independent producer to effect corporate mergers and consolidations to achieve economies of large scale operation. But the Sherman Act, which looks to the purpose and effect of a combination, makes no distinction based solely on form. Consequently, it permits small businesses by cooperative effort to achieve the advantages otherwise attainable by merger or consolidation and thus compete on a parity with larger concerns. And this may be done without sacrificing the independence or the separate identity of the relatively small American business units. And so it is that the decision in the *Appalachian Coals* case is promotive of competition since it points a way to place small business units on a competitive parity with large corporations. Without digressing too much from an examination of these cases it seems pertinent to point out that the selling agency which was approved in the *Appalachian* case was merely one form of cooperative associations which are being so widely discussed today as possible instruments through which business men can, by cooperative efforts, correct economic abuses within the letter and spirit of the anti-trust laws.

In *United States v. Standard Oil Company (Ind.)*, 283 U. S. 163 (1931), the Supreme Court upheld certain cross-licensing agreements in the oil industry. There has recently been a great deal of agitation against "patent pool monopolies," and for that reason the decision is of current interest.

At the last session of Congress the House Committee on Patents conducted an extensive investigation of this subject. The proceedings before this committee show very clearly that there has been a general failure to analyze the nature of these so-called "patent pools" and to distinguish them from mere cross-license agreements.

Originally the words "patent pool" described a combination of patentees who by agreement had combined or otherwise disposed of their patent rights for the sole purpose of restraining trade or obtaining a monopoly. Perhaps the best instance of such a pool is the first harrow trust, in which the harrow manufacturers transferred all their patent rights to a single company which thereby achieved a complete monopoly of the business.[5]

The decisions in the *Harrow* cases, as well as in many cases in the lower courts, show conclusively that any direct attempt to restrain trade or achieve a monopoly through such a patent pool is illegal, and that no further legislation is necessary to eliminate such combinations.

There is, however, another type of arrangement which is commonly called a "patent pool," but which might more correctly be described as "an interchange of patent rights." Such an arrangement has as its purpose not the restraint of trade, but the elimination of confusion and economic waste which our present patent system imposes upon any highly developed industry. In many such industries, ambiguous claims, problems of interpretation, and overlapping patents, coupled with the great expense of infringement litigation, make it almost suicidal for the companies involved to assert their conflicting patent rights. One famous infringement suit lasted for over fifteen years, and the companies involved spent nearly $4,000,000 before it was compromised.[6] Faced with the prospect of such interminable litigation, many industries have entered into what are known as "cross-license agreements," whereby each member gives the rest of the group a license and immunity under its patent rights in consideration for receiving a similar license and immunity from them.

It was this type of arrangement which was considered in *United States v. Standard Oil Co. (Ind.)*, *supra*. The oil-cracking cross-license agreements considered in that case had, it is true, originally contained some features which the Government claimed constituted restraints of trade. These features, however, were eliminated, and the agreements came before the Court simply as a device to minimize the terrific cost of patent litigation and remove the restraints which an uncertain patent situation imposes on interstate commerce. The Court held that such agreements did not violate the anti-trust laws. Mr. Justice Brandeis, who wrote the opinion, reviewed the history of the situation and pointed out that if the agreements had not been executed interstate trade and commerce in cracked gasoline would have been practically blocked by interference litigation. He concluded:

> ". . . An interchange of patent rights and a division of royalties according to the value attributed by the parties to their respective patent claims is frequently necessary if technical advancement is not to be blocked by threatened litigation. If the available advantages are open on reasonable terms to all manufacturers desiring to participate, such interchange may promote rather than restrain competition. . ." (p. 171.)

In reliance on the oil-cracking case, most of our major industries are operating under cross-license agreements today. The list of products manufactured under such agreements includes automobiles, gasoline, airplanes, telephones, telegraph equipment, radios, talking pictures, oil burners, outboard motors and business machines. In each of these cases the interchange of patent rights has been of inestimable value in clearing up the patent situation and enabling the participants to proceed without the threat of endless and expensive litigation. The resulting possible benefit to the consumer is self-evident. As indicated, however, by Mr. Justice Brandeis in the *Standard Oil* case, the legality of the arrangement is dependent *upon making the advantages of the cross-licenses available to all competitors on reasonable terms.*

Nevertheless, there is still some feeling against such interchange of patent rights. At the recent Congressional investigation, many small manufacturers appeared and testified at great length about restraints and monopolies which they thought were being protected by cross-license agreement in their particular industries.[7] It

5. (a) First Harrow Trust (all patents turned over to one company which thus acquired right to manufacture). *Strait v. National Harrow Co.*, 18 N. Y. Supp. 224 (Sup. Ct. Sp. Term, 1891).

(b) Second Harrow Trust (all patents turned over to one company which then licensed the assignors on certain conditions). *National Harrow Co. v. Quick*, 67 Fed. 130 C. C. D. Ind., 1895; aff'd 74 Fed. 236 (CCA 7th, 1896); *National Harrow Co. v. Hench*, 76 Fed. 667 (C. C. E. D. Pa., 1896) aff'd 83 Fed. 36 (CCA 3rd, 1897); *National Harrow Co. v. Hench*, 84 Fed. 226 (C. C. N. Y., 1898); *Bement v. National Harrow Co.*, 186 U. S. 70 (1902) aff'g 163 N. Y. 505, 57 N. E. 764, reversing 21 App. Div. 290, 47 N. Y. Supp. 462.

6 *Universal Oil Products Company v. Standard Oil Co.* (Indiana), No. 121, United States District Court for the Western District of Missouri.

7. See Hearing Before the Committee on Patents, Seventy-fourth Congress, on H. R. 4523.

must be admitted that abuses are possible. The parties to the cross-license agreement may, for instance, attempt to use it to maintain prices or to mark out exclusive territories or to restrain trade in unpatented articles. In some cases parties to a cross-license agreement have used it as a sort of offensive alliance, hiding behind the agreement themselves while they overwhelm outsiders who had been excluded from it with a multiplicity of infringement suits. But the courts have already shown that they have no patience with the use of license agreements in this way. Such agreements are illegal. If, however, an interchange of patent rights offends in this way, the defect can be remedied without discarding the highly beneficial principle on which the whole scheme of cross-licenses rests.

If a mere interchange of patent rights, without any direct attempt to affect the normal course of trade, does in fact restrain trade, the defect probably lies in our system of patent laws rather than in the anti-trust laws. Under the conditions now existing in the patent laws many industries would be seriously crippled if the members were compelled to embark on an indiscriminate course of infringement litigation. For that reason, I believe that the situation calls not for further prohibitive legislation, but for a thorough study of the defects in the patent system which makes cross-license agreements necessary. In this connection it might be noted that the bill introduced in the last Congress provides, not for the elimination of cross-license agreements, but for a method of registration which would make the whole system available for study. With the knowledge gained from such a study Congress should be in a position to enact legislation which would eliminate the necessity for cross-license agreements in the future without depriving the industries involved of the tremendous advantages which have come from cross-license agreements.[8]

B—I have begun my discussion of recent anti-trust cases by commenting upon those which were lost by the Government. There are other cases decided in this ten-year period which are helpful in this analysis.

The case of *United States v. Trenton Potteries,* 273 U. S. 392 (1927) has evoked much criticism. There the Supreme Court held that a price agreement among those dominating an industry was illegal regardless of the reasonableness of the price fixed by the agreement. It has been urged that this decision seriously handicaps industry by preventing it from establishing by agreement a "reasonable" price. It is said that certain industries faced with a price war have no alternative but to agree upon a reasonable price. To my mind, however, the decision is fundamentally sound. But it is inconceivable that in the absence of price regulation by the Government our people will permit those controlling an industry to determine the price at which they will sell articles to the public. Obviously those whose profit is largely dependent upon price are not impartial judges of what is a reasonable price in the public interest. Until the competitive system has been supplanted by one of Governmental operation or control, I know of no sound policy in favor of subjecting the public to the concerted judgment of competitors as to what is a reasonable price.

In the *Sisal Sales* case the Court extended the provision of the Sherman Law to a foreign monopoly which attempted to foist its power and practices upon the American market.[9] In the *Paramount* and *First National* cases the Court again applied the doctrine that those dominating and controlling an industry may not by agreement impose upon their competitors or upon third parties conditions under which the dominant group will permit such competitors or third parties to engage in business.[10] This principle was applied in condemning the provisions of the so-called Uniform Contract adopted by the motion picture industry. The *Brims*[11] and *Local 167*[12] cases demonstrate that the Sherman Law forbids criminal and tortious acts by individuals acting in combination under the guise of a labor union when those acts were intended to or have the necessary effect of restraining interstate trade and commerce.

III

In approaching the question whether these decisions show a need for substantive revision of our anti-trust laws, we must first determine a fundamental question: What is our objective in Government? Is it governmental operation, management, and control of business, or is it to preserve and maintain the competitive system under a law designed to protect the public and industry from the abuses of that system? Those who would remove the inhibitions of existing law must recognize that the alternative is not between the Sherman Act on the one hand and regulation of industry by industry on the other. The alternative is between the continuance of the competitive system as a proper safeguard to the public and the closest supervision and control of industry by the Government. The self-interest of business in such matter would often be antagonistic to the interest of the public as a whole. The recent experience under the N.R.A. shows the abuses that may arise by vesting in business the power of self-regulation without at the same time providing for adequate and capable supervision and control by a Governmental agency.

Those of us who believe in stimulating individual initiative under the competitive system will find encouragement in this series of decisions during the past ten years. An examination of them will support the conclusion that the law is sufficiently elastic to meet changing economic conditions and yet is sufficiently drastic to prevent any form of combination which is intended to or has the effect of restraining interstate commerce. It is true that neither the Sherman Law nor the cases under it precisely define the acts which are condemned, and in that sense, and in that sense only, the law is indefinite. But in my opinion, this is the basic strength of the law. It enunciates and protects the competitive principle not only by specific enumeration of illegal acts but in terms which are sufficiently broad to check any attempted evasion of its purposes and which are equally definite enough to serve as an effective guide to business concerns that desire to avoid conflict with the law.

Any attempt to supersede the broad definition of policy contained in the Sherman Act by a specific enumeration of acts which are declared illegal would, I am

8. *United States v. General Electric Company,* 272 U. S. 476 (1926) is not discussed for the reason that the principle there announced is believed not to be of great general interest. The proposition that a patentee may control the price of a patented product in the hands of its licensee was established by the *Bement* case, *supra,* 186 U. S. 70 (1902). The only other point of importance decided in this case was that a principal may control the price to be charged for an article in the hands of an agent of the principal.

9. *United States v. Sisal Sales Corp.,* 274 U. S. 268 (1927).

10. *Paramount Famous Lasky Corp. v. United States,* 282 U. S. 30 (1930); *United States v. First National Pictures,* 282 U. S. 44 (1930).

11. *United States v. Brims,* 272 U. S. 549 (1926).

12. *Local 167 v. United States,* 291 U. S. 293 (1934).

convinced, necessarily result in failure. I venture to say that no person familiar with the problem would undertake such a task with any confidence in his ability to describe all of the acts which should be condemned.[13] An attempt to define those proceedings or acts which fail to meet the "due process of law" clause of the Constitution would be no more difficult or confusing. Moreover our experience with the enforcement of the Clayton Act demonstrates that attempts to particularize those acts which are *per se* illegal may too easily lead to evasion and avoidance.

The Clayton Act was an attempt to particularize the conditions under which business conduct would be illegal. It was thought that monopoly could be attacked and at the same time prevented if an attempt were made to outlaw discriminations in price which were at once the symptoms and the causes of monopoly.

The debates in Congress which led to the passage of the Clayton Act show that Congress first attempted a simple and direct prohibition against any discrimination in price. Further consideration indicated that the task was not so easy, and so one qualification after another crept into the Clayton Act until the legislature was bewildered.

Ever since the enactment of the Clayton Act there has been criticism of Section 2, which is the provision on price discrimination, and chiefly on two grounds: first, because it permitted quantity discounts but established no measure for them; second, because it permitted discrimination in price when made in good faith to meet competition.

Section 2 of the Clayton Act has now been amended by the Robinson-Patman Act. It is obvious that the same difficulties in attempting to condemn specific practices have faced the Congress and that the result is no more satisfactory than the original law. Every lawyer has seen for himself that within the past two months this latest attempt to make the anti-trust laws more specific has resulted in the bewilderment of business, and, strangely enough, this law which was thought to be aimed at chain stores and big business is causing concern to industry in all its branches, and more particularly to the smaller units of business.

The Robinson-Patman Act contains four sections: Section 1 prohibits price discrimination between two or more customers of the same seller; Section 2 safeguards pending cases; Section 3 imposes criminal penalties for participation in price discrimination; Section 4 safeguards the dividends of cooperative associations.

The first section of the new law is built upon the structure of Section 2 of the Clayton Act. Both the old law and the new make it unlawful for any person engaged in interstate commerce to discriminate in price between different purchasers of commodities which are sold for use, consumption or resale within the United States. The new law specifies that there must be a comparison of prices between commodities of like grade and quality. Furthermore, the new law points out that intrastate transactions may be compared with inter-state transactions for the purpose of determining whether the latter involve unlawful discriminations.

Not all discrimination is forbidden either by the new law or by the old one. Under both of these statutes it is not the nature of an act which is condemned; it is the effect of any act which is the test of illegality. Under the Clayton Act price discrimination was declared to be unlawful "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce," and this language is continued in the new law. However, it was probably felt that many acts were wrongful even though they did not have the effect of lessening competition as a whole. Accordingly the new law states that price discrimination is also unlawful where the effect may be "to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." Now presumably it is sufficient to show that some one person is injured by the discrimination.

After establishing this general rule against price discrimination the new law, like the old one, makes certain exceptions. The Clayton Act allowed different prices because of purchases in different quantities. The new Act permits differentials which make only due allowances for differences in cost. In some respects that exception is broader than the former one because it permits the seller to pass on savings in cost whether they result from the handling of different quantities or from some other reason. At the same time the new rule is more stringent than the old one because it sets up a definite limit beyond which quantity discounts may not be given, and in fact the Federal Trade Commission is given power in certain cases to fix the limits of quantity discounts.

Both the old law and the new made it clear that persons were to be protected in their right to select their own customers. The new Act contains another exception in recognition of the price changes which take place by reason of changing conditions affecting the market.

The Clayton Act further exempted discriminations which were made in good faith to meet competition. No such general exception is stated in the new law, but it provides that in matters before the Federal Trade Commission the burden of proof is upon a seller to show that his lower price was made in good faith to meet an equally low price of a competitor.

The Robinson-Patman Act was passed for the purpose of clarifying the law, of protecting small business and the consumer, and of effectuating our fundamental policy against monopoly. Yet I cannot help feeling that this latest attempt to particularize the anti-trust laws will defeat its own purpose. Instead of making the law more certain, it has increased confusion. While we may criticize this Act, it is fair to assume that it is going to remain on the statute books. The chances are, instead of being liberalized, it will be made more stringent. It is something that we will have to live with.

It is of course not intended to condemn any attempt to define accurately those acts which are illegal under the anti-trust laws. There are indeed certain methods of competition which Chief Justice Taft discussed as—badges of the unlawful purpose denounced in the anti-trust law which could not only be dealt with specifically but also by criminal process. Experience, however, has demonstrated that economic questions arising under the Sherman Law ought not in their entirety be dealt with by criminal process. Our petit juries in criminal cases were never intended to adjust border line conflicts between broad public policy and complex private enterprise. It seems to me that the criminal provisions should be withdrawn from the existing anti-trust laws and consolidated in a penal statute, dealing with particularized offenses.

IV.

I have cited the Robinson-Patman Act to indicate the difficulty, if not the futility, of attempting to make

13. Even if successful, the inevitable result would be to eliminate the element of elasticity that is essential in meeting methods and conditions as yet unforeseen and unborn.

our civil laws on monopoly more specific. I have quoted at the beginning of this paper the words of the Supreme Court in support of this view. It has always seemed to me that like the development of the law merchant the process of determining what constitutes unfair trade practices will be slow and largely dependent upon the intelligent cooperation of the industry itself.

I also cite this new statute for another purpose. I think it shows very clearly that there should be some means whereby business in its confusion over a law of this kind should have an opportunity to consult with government in the hope of reaching a mutual *understanding in advance* of the rights and obligations which the law entails.

Your Committee has given great consideration and study to the question of administrative reform in dealing with the anti-trust laws. Various proposals have passed through your hands. It is in compliance with the request of your Chairman that I now direct your attention to the draft of the bill you now have under consideration and which I understand is the seventeenth revision.

The proposed Bill provides for the filing of "contracts" with the Federal Trade Commission. The word "contracts" is construed broadly so as to cover almost any written evidence of cooperative activity. It is provided that after a "contract" has been on file with the Commission for sixty days the legality "of acts done thereunder" shall be conclusively presumed except in proceedings before the Commission under the proposed Act.

The Act defines "reasonable restraints of competition or trade" for the purposes of the Act as follows:

> " 'Reasonable restraint of competition or trade' means a restraint which does not tend to create a monopoly but is promotive of sound and healthy competition by eliminating unfair, destructive and cut-throat competitive methods and practices by mitigating any undue advantage in the market to sellers or buyers of large as against small concerns, by avoiding or mitigating the destructive effects on fair competitive price of insufficient or excessive supply, or by diminishing the burden on Commerce of wasteful duplication or producing, processing or marketing facilities, or of other wasteful practices."

The proposed Act in my opinion contains certain serious defects.

1. The definition of "reasonable restraint of competition or trade" contained in the Act is broad. But unlike the words "restraint of trade" and "monopoly," contained in the Sherman Act, it does not derive its meaning from the common law. It has not been defined by judicial decision, and will not add certainty to a law already criticized as being indefinite. But a more fundamental objection to this definition is that it permits competitors by agreement to limit production, eliminate "wasteful duplication of producing" facilities, and other similar practices. It has never been my feeling that it would be wise to permit industry to make such agreements limiting production or eliminating marketing or processing facilities unless such industries were under the closest supervision and control of government. And I am not prepared to say that such regulation and supervision is desirable in all industries. It may be that in some industries the competitive principle can no longer be relied upon to safeguard the public against exploitation. In such an industry, control by Government must and will come. But the proposed bill gives that control to industry itself.

2. The Act provides that unless a "contract" is rejected by the Commission within sixty days the acts done thereunder shall be conclusively presumed to be legal except in proceedings before the Commission under the proposed Act. This provision would eliminate the possibility of treble damages resulting under a "contract" which the Commission had failed to reject. It must be based upon the assumption that within sixty days of the time any "contract" is filed the Federal Trade Commission will be able to examine and determine its legality and also to determine the legality of acts to be done thereunder. The mere recital of such a provision seems to me a sufficient indictment of the proposal. The administrative difficulty of passing upon a mass of proposed "contracts" makes it absurd to assume that any "contract" or acts to be done thereunder will not illegally injure third parties merely because the Federal Trade Commission or any other body has failed to take adverse action for a sixty day period. My own experience convinces me of the difficulty if not the impossibility of predicting in advance just what the effect of a particular "contract" will be. I therefore suggest that the draft is unsound in depriving an injured party of his right to damages on account of any "contract" filed with the Commission or acts done thereunder. As I have previously stated, the deterrent effect of possible treble damage actions is a material factor in the enforcement of the Sherman Law and the right to such damages should not be taken away unless complete Governmental supervision and control is substituted for the competitive system.

3. The only person who as a matter of right may object to "contracts" filed with the Commission or the acts done thereunder is the Attorney General. Section 3 provides that "Any person claiming his interest to be adversely affected by any such contract or by the performance thereof may be allowed by the Commission * * * to file a like complaint." It seems to me clear that a party adversely affected should have an absolute right to file a complaint and to have the Commission determine the merits of the issues thereby raised.

This proposed bill is consonant with the statement of the Committee in its Annual Report. That Report indicates that, in its view, the Sherman Act impedes and restricts management in safeguarding necessary capital, providing for the employment and compensation of labor and in satisfying the consuming public. I cannot agree with this view. As I read the cases, the Supreme Court, in interpreting the Act, is alert to approve those industrial agreements and practices which are economically wise and which would promote rather than destroy the competitive system. In my experience the fault is likely to rest more with industry than with the Courts. So many leaders of industry look to the immediate rather than to the ultimate. They fail to see that business pays a price to government for every bit of security that it demands and that price is closer governmental control. And we as lawyers have contributed to that short view. Too often the lawyer has yielded to the demand of the business man who says, "I do not want a lawyer to tell me what I cannot do. I want a lawyer who will tell me How I can do what I want to do." Too often what he wants to do is that which should not be done in the public interest. But the lawyer gives him a loophole. It so often happens that the loophole of the present is only a noose around his neck in the future.

We ought to realize that in our people is inherent the fear of an industry that is unrestrained and uncontrolled. When you find, as you do today, both political parties vieing with each other by writing into their platform planks calling for the destruction of monopolies and a more stringent regulation of business we know

that is only responsive to a deep-seated feeling among our people.

In criticizing this proposal I do not mean to condemn its provisions in their entirety. In 1930, before the New York State Bar Association, I advocated changes in the administration of our anti-trust laws. Since that proposal points up the disagreement with some of the provisions of the draft of this Committee I shall briefly restate it.

V.

Those who have had experience in dealing with anti-trust cases realize that most disagreements arise not so much from a misapprehension of the law as a failure to understand and analyze the facts themselves or their significance in a given case. To insure that the facts and their purpose and effect are properly understood, authority to hear and determine all anti-trust cases instituted by the Government (other than criminal prosecutions) should be vested and centralized in some single agency charged with the responsibility of decision and with a personnel intelligently fearless in accepting that responsibility. But to accomplish this purpose, in a revision of the law, even for administrative purposes, it seems to me that we should avoid the danger of going too far and attempting too much. I think we can do better by taking simple steps. With this in mind I would use the instrumentalities we already have and see what can be done to improve them.

To that end I recommend that the Federal Trade Commission should be changed from a body having the combined powers and duties of an investigator, prosecutor and judge, into a body advisory and quasi-judicial.

The procedure which I have already suggested is as follows:

First: All proceedings to enjoin violations of the anti-trust law should be brought exclusively before the Federal Trade Commission. Such proceedings could be instituted by the Attorney General or by private litigants.

Second: Actions for damages on account of alleged violations of the anti-trust laws could, at the option of the litigant, be instituted before the Federal Trade Commission or before any District Court of competent jurisdiction in the United States.

Third: Criminal cases would continue to be prosecuted in the District Courts.

In matters before the Federal Trade Commission it should be provided that decisions of the Commission would be conclusive as to the facts. Appeals from their decision as to the law could be had, as now, to the Circuit Court of Appeals, or perhaps to a specially constituted Court whose determination on review should be final, except as to constitutional questions.

It also seems advisable to provide that parties entering into agreements affecting inter-state commerce should be given the right to submit their proposed plan to such a Commission. Business men should not be required to experiment at their peril in this field of the law. I believe that business as a whole desires to comply with the legal requirements, and it should have an opportunity to learn in advance the attitude of the Government.

Referring such proposed agreements to the Commission would be analogous to the procedure for securing declaratory judgments. In cases of this type the Commission should be authorized and directed to give advisory opinions, when, after a hearing at which the Attorney General should appear in behalf of the Government, the Commission finds that the giving of such advisory opinions would be in the public interest.

Such an opinion should not preclude the Government or a private litigant from bringing subsequent proceedings or actions after the agreement has been in operation. However, the opinion and any finding of fact contained therein should be *prima facie* evidence of the legality of the agreement passed upon and of the existence of any fact found in that opinion.

We have not yet devised an economic system to replace the principle of free competition, which will adequately protect the public from the dangers of monopoly without undue governmental supervision and regulation of industry. Until we are prepared to abandon the competitive principle, the anti-trust laws must remain to prevent abuses which, if unchecked, would destroy that principle and substitute monopoly, with all its attendant evils.

The administration of the anti-trust laws, however, can and should be changed, so as more nearly to conform to the purpose for which they were enacted. That purpose was not to conduct a series of raids upon industry, but to ensure that industry would conform to certain standards of business conduct. Inherently there should be no conflict between legitimate business and government. By the adoption of some method of administration similar to that suggested, the honest business man would be able to avoid conflict with the law, and the public interest would be better served by guaranteeing that illegal combinations and agreements would be dealt with in their inception by a body of experts.

Provisional Roster of House of Delegates

(*Continued from page 794*)

Criminal Law—JUSTIN MILLER, of the District of Columbia.

Mineral Law—CHARLES I. FRANCIS, of Texas.

Municipal Law—ARNOLD FRYE, of New York.

Insurance Law—JESSE A. MILLER, of Iowa.

International and Comparative Law—JAMES OLIVER MURDOCK, of the District of Columbia.

Junior Bar Conference—JOSEPH D. STECHER, of Ohio.

Real Property, Probate and Trust Law—NATHAN WILLIAM MACCHESNEY, of Illinois.

PERSONS HAVING THE PRIVILEGE OF THE FLOOR OF THE HOUSE (BUT WITHOUT VOTE)

The Chairman of each Standing and Special Committee of the Association.

Through the efforts of the Montana Bar Association an action is now being prosecuted in the Supreme Court of Montana to test out the legislation in Montana relative to the practice of the law and to define the unlawful practice. The name of the case is State ex rel. Attorney General vs. Merchants Credit Service.

The Committee on Bar Registry of the New York State Bar Association in cooperation with the Committee on Unlawful Practice of the Law, are preparing the second issue of the "Bar Registry" containing the names of all members of the Association with a listing as to the particular field or branch of the law in which they specialize or practice. The second issue will also contain information regarding the names of the County Clerks and other County officials throughout the State.

THE NEED FOR REVISION OF THE ANTI-TRUST LAWS

Important Questions Which Present Themselves in Considering Any Revision of These Laws —Unregulated Competition and Monopoly—Need of Redefining Our Objectives in Light of Long Experience and Limiting Such Objectives to Those Public Opinion Will Support—Some Dogmatic Conclusions*

By Donald R. Richberg
Member of the Washington, D. C., Bar

[*Preliminary Statement:* Just about thirty years ago I ventured to make public my first proposal for amendment of the anti-trust laws, and discussed this with Attorney General Moody at the suggestion of President Theodore Roosevelt. A few years later the Senate Committee on Interstate Commerce was burdened with some testimony of mine on this subject. Then in November, 1913, the Progressive Party Anti-Trust Program was presented to Congress in the form of three bills which I had drafted under the guidance of a committee of notable lawyers, headed by William Draper Lewis, the present eminent director of the American Law Institute.

These progressive "trust triplets" provided for the creation of an "Interstate Trade Commission" empowered to prevent unfair or oppressive competition in interstate commerce, and to protect such commerce against monopolies.

This official Progressive Program was supported by its members of Congress, its national organization and its leader, Theodore Roosevelt. Parts of it became law in the Democratic measures which were enacted in the fall of 1914—the Federal Trade Commission Act and the Clayton Act.

Without detailing any further my long and intensive study of the problems of governmental regulation of competition, it may be appropriate for me to observe that I did not engage in the drafting or administration of the National Industrial Recovery Act in 1933 with all the confidence that a solution for these problems had been found, which may have inspired some who had not had an equally long and chastening experience in the efforts to get the lions and the lambs of commerce to lie down together in a governmentally controlled house of fair competition. But I did believe, and now feel sure, that the experiment of the N.R.A. should aid in a much clearer understanding of these problems, and point the way toward a more sound and effective public policy.]

THE primary question presented in considering any revision of the anti-trust laws is this: How far is it necessary to regulate competition in order to preserve fair competition? This immediately leads to a second question: How far can competition be regulated without destroying the essentials of a competitive system of private enterprise?

In order to deal dispassionately with these questions we must try to eliminate certain prejudices and illusions which commonly confuse our efforts to think clearly and to discuss candidly the problems of governmental supervision or control of business operations.

We talk loosely of free competition and free enterprise, as though we had in mind an ideal of absolute freedom from any political interference in a "natural" order of things in which producers, distributors and consumers, unhampered by any laws, automatically would produce and exchange, in an unrestricted market, a supply of all possible goods and services equal to the demand, with assurance of a fair exchange between uncoerced sellers and buyers.

But when we examine into the historical facts we find that no such order of things has ever existed in any large community—and no such order ever can be established in a modern nation. Disregarding a host of other causes for an increasing social control of private enterprise, let us concentrate our attention at the outset on the effect of monopolistic purposes and practices which develop early in business competition.

An unregulated system of competition paradoxically produces at once the monopolistic seeds of its own destruction. The stronger competitors naturally eliminate weaker rivals and, with increasing dominance in the market, move steadily toward the alternatives of combination into one all-powerful organization or agreement among the large surviving units to maintain profitable prices and for that purpose to allocate production or areas of distribution.

This trend is inevitable because unlimited, unregulated competition must result in wasteful duplications of expenditure and narrow, uncertain profit margins, which any efficient business man, seeking the obvious goal of secure and satisfactory profits, will try to eliminate.

We can hardly question the conclusion that without some form of anti-monopoly laws the eventual outcome of trade and industrial operations in serving the major essential needs of a modern community would be the concentration of control in organizations of such size and economic strength that effective competition would become impossible to inaugurate or to maintain. The trend toward such an outcome is now obvious in those fields of enterprise where a very large capital investment and far reaching organization is essential, thus assuring enormous development losses to any small enterprise which might attempt to invade a well-occupied field—such as that of automobile manufacture.

On the other hand where a small amount of capital and a compact efficient organization can quickly establish an effective competition in price or service, the

*Address delivered at the Open Forum Discussion of "The Need for Revision of the Anti-trust Laws," at a meeting of the Committee on Commerce of the American Bar Association held in Boston on August 26, 1936, Chairman Harold J. Gallagher, of New York, presiding.

natural, monopolistic advantages of large scale enterprises may be balanced by weaknesses inherent in big organizations. Bureaucracy, red tape, inertia, remote controls, inflexibility and excessive conservatism, are familiar examples of these weaknesses.

Here enters into our problem the factor of unfair competition developing both in the abuses of power by big business, evidenced, for example, by price wars or discriminations, and in those cutthroat practices of little business which may defraud the customer as to the quantity or quality of goods delivered, and deny to the worker a fair reward for his labor.

Thus we find ourselves confronted with the need for eliminating those methods of competition which we try to define as "unfair," either because they promote a monopolistic control of what should be a free market, or because they promote a freedom to injure others which degrades the processes of production and exchange into a primitive warfare abhorrent to our standards of civilization.

Up to the present time we have come to accept the need for such laws as will prevent monopolistic controls and outlaw the most generally disapproved forms of unfair competition. But on the whole these laws have been pretty unsatisfactory both to business men and to the consuming public. They have imposed a great many uncertain, hampering restraints upon legitimate business operations; and they have not prevented some of the most offensive methods of unfair competition. They have not protected consumers from excessive prices for many essential goods and services, although consumers have been partly compensated for such overcharges by the socially and economically unsound privilege of buying many other things for less than a reasonable cost of production.

To go right to the heart of our present problem let us agree that we have not yet arrived at a consistent national economic policy which is, or can be, expressed in law. One of the most compact expositions of this situation will be found in Mr. Gaskill's recent book, "The Regulation of Competition." Another more extended demonstration will be found by anyone who reviews without economic or political partisanship the history of the N.R.A.—an effort which I undertook (with a less favorable bias than may be assumed) in a book entitled "The Rainbow."

Consider for example our attitude toward monopolies. Regardless of politics we all solemnly declare that "a private monopoly is indefensible and intolerable." But then we write laws establishing patent monopolies throughout the business world with no legal qualifications to prevent intolerable and indefensible abuses of the powers thus granted to regulate and stifle competition.

We write protective tariffs for the avowed purpose of protecting the earning power of not only American capital but also American labor—including, we should assume, agricultural labor. But we have no established and effective policy to insure to the worker and consumer behind that tariff wall the protection of his standard of living, which the limitation of imports is intended to provide.

We not only permit, but by constitution and statute we secure, to the private owners of natural resources, unregulated monopolies of raw materials which are primary necessities. As a result, if controlled by a few, these essentials can be slowly sold at high prices; or, if widely held, they can be recklessly wasted in a scramble for sales at prices insufficient to pay even a decent wage for the labor employed in their production and distribution.

We not only permit, but by our corporation laws we encourage, the development of gigantic artificial persons with tremendous powers and economic advantages over the individual manufacturer or merchant or farmer or industrial worker; and then we legislate in haphazard fashion against big business operations in order that these giants of our own creation may not trample down all individual enterprise.

Consider likewise our lack of any consistent or well defined public policy in the protection of fair competition. Long, long ago we abandoned the notion that trading was a game of wits in which there were no moral obligations on either side. And in recent decades we have looked beyond the immediate interests of a seller and a buyer and have found a public interest in the methods of competition employed by sellers in their rivalry with each other. Still more recently the concept of a public *moral* interest in fair trading has been extended to recognition of an equally vital public *economic* interest in preventing industrial demoralization, business depressions and social insecurity, of which one contributing cause is cutthroat competition with its accompanying degradation of labor conditions.

The public economic interest, underlying the Clayton Act, was also concerned with unfair competition because (in the language of Mr. Justice Brandeis): "The belief was widespread that the great trusts had acquired their power, in the main, through destroying or overreaching their weaker rivals by resort to unfair practices." Thus the legislative policy embodied in the creation of the Federal Trade Commission seemed to be a logical effort to supplement the prohibitions of the Sherman Anti-Trust Law with an administrative regulation of competition so as to insure that the methods employed in selling goods should be fair.

The latest and in many ways the most far reaching extension of governmental power began with legislation designed to regulate maximum hours of work, minimum wages, the employment of child labor and other labor conditions, which have a direct economic effect on the production as well as the distribution of goods and services.

In the early stages the objectives of such regulations were generally regarded as only moral. The effort was to remedy the social evils of excessive hours of labor, of wages insufficient for a decent subsistence, of stunting the growth and crippling the lives of little children, of subjecting wage-earners to insanitary and dangerous conditions of employment. During the great depression, however, with its extraordinary stimulation of economic thinking, there arose a strong opinion, even in many conservative groups, that a principal factor of unfair competition in which there was a public economic interest was the competition between employers in reducing labor costs by excessive hours of work, inadequate wages and other measures of social injustice which had baneful economic consequences in reducing the volume of employment and purchasing power.

There is today too much controversy among economists, politicians and organizations of employers and employees over the economic effects of regulating hours, wages and working conditions to expect any general agreement upon a national economic policy which would go very far in the direction of eliminating competition in labor costs. Indeed we must recognize that this competition is frequently the dominant element in price competition—so that any comprehensive regulation of labor costs may become in effect price regula-

tion, and hence profit regulation, and practically force governmental price fixing and profit fixing. Such a development could hardly be regarded as a means of preserving a competitive system of private enterprise.

Thus we are compelled in seeking for any unity of public opinion in support of a revision of the anti-trust laws to carry forward our concept of unfair competition with caution and self-restraint both in the field of trade practices and in the field of employment conditions. Otherwise regulations of competition may eliminate the essentials of competition.

In regard to labor practices it was made quite evident in the two year experience of the N.R.A. that methods of competition which met with the disapproval of a large majority of those engaged in a particular industry might be supported as fair and necessary to their survival by a vigorous and militant minority.

In regard to labor practices it was made quite evident that often maximum hours and minimum wages meant entirely different things to employers and to employees. If the employer could establish a forty-hour week, but felt that forty-eight would be occasionally necessary, he conceived that forty-eight was logically the maximum. On the other hand the normal forty hours, or even a possible thirty-six, would be the only definition of maximum which the employees would regard as sound.

In the same way the definitions of a "minimum wage" which developed in debates over code requirements would vary from one extreme of the lowest wage which could be justified on any ground for the lowest paid worker, to the other extreme of the lowest wage which would be acceptable to a worker of special skill and long experience.

It is apparent that if we are to revise the present anti-trust laws so that they may provide a means of carrying out a consistent national economic policy we face the need of redefining our objectives in the light of a long and rather sad experience and of also limiting our objectives to those which will have the vigorous support of well-established public opinion.

Just to indicate the problem let me attempt a few dogmatic conclusions:

1. To maintain a competitive system we must prevent the acquisition or exercise of any monopolistic power to regulate prices or production, except where a public monopoly, or a private monopoly under public regulation, is found socially or economically desirable, as in the case of public utilities.

2. Large business operations are a natural development and, if not artificially supported by special privileges and political aid, or by unfair competitive practices, can usually be subjected to effective competition.

3. If size alone gives to large business operations monopolistic power, there are the alternatives of compelling reduction in size or requiring submission to such public supervision or regulation as may be necessary to require adequate service at reasonable prices. Neither alternative should be excluded by law, because in specific cases one may serve the public interest far better than the other.

4. Dominance in a trade or industrial field does not necessarily give monopolistic power because competition within the field or competition from other fields may maintain the reality of competitive incentives and correctives.

5. Agreements for cooperation within or between trades and industries to promote and maintain an actual and fair competition are in the public interest so long as openly made with the resulting cooperation subject to public scrutiny, so that a choice may be required between their abrogation, or revision, or an increase of public supervision, if such agreements are found at any time to be operating against the public interest.

6. Monopolies and monopolistic practices should be prohibited by statutes clearly defining what they are. These prohibitions should be applied to specific cases by an administrative commission authorized to issue restraining orders, with the statutory penalties made applicable to violations of such temporary or final orders, made in conformity with the procedural and substantive requirements of the law.

7. Without unduly postponing or denying any necessary resort to the courts to prevent and punish wrongdoing, every practical method should be employed to insure an administrative investigation and application of the law prior to judicial proceedings of a punitive or remedial character. This would not only relieve the courts of many undesirable responsibilities, but should also promote consistency and certainty in the obligations imposed on business.

8. Unfair competitive practices should be prohibited by statutes clearly defining them as to methods and objectives. These prohibitions should be applied and enforced by the administrative commission in the same manner as prohibitions of monopolistic practices.

9. The developing field of trade agreements should be supervised by an administrative agency charged with the duty of maintaining the laws against monopolistic and unfair trade practices, but authorized to sanction agreements clearly within the law or within any twilight zone, subject to the rights of public or private objectors to submit a complaint to the administrative commission for a decision, which like all commission orders would be subject to judicial review.

If time permitted, the meaning and application of these dogmatic conclusions might be clarified by many examples. But for the present let me only point out the purposes of the substantive law outlined and the reasons for advising the enforcement procedures which are suggested.

In the first place, in this day of large business organizations and the inevitableness of consolidations, interlocking controls, and cooperative agreements of infinite variety, there should be a clear legal distinction between mere size and actual monopolistic power, and also between the possession of power that may be abused and the actual abuse of power.

It is, for example, illogical and indefensible to prohibit a corporation from absorbing a competitor, whereby the better integrated combination can more effectively compete with a powerful rival, and at the same time to sustain the right of this powerful rival to crush its competitors one by one by its financial power, its control of a natural resource or a patent, or by cut-throat and unfair competition. If we are seeking to prevent the growth of a monopoly we should not direct intelligent governmental action toward stopping any spade work and cultivation of the soil in which a monopoly *might* grow; but we should direct our action against those who are actually raising a monopoly plant and against all the methods used for that purpose.

Such an effort can never be successful by attempting the judicial enforcement of the sweeping prohibitions of the Sherman Act—nor even by supplementing that Act with prohibitions of interlocking directorates and price discriminations. Monopolistic practices can be observed and defined without great difficulty when we once accept the simple fact that we are seeking to maintain, and to prevent the destruction of, competi-

tion—an objective which, by the way, is not even mentioned in the Sherman Act.

An administrative commission, guided by legislative standards and invested with the duty of preventing either the destruction of competition or the use of unfair methods of competition, should be expected to develop a body of legal restraints which, with judicial sanction, would eliminate monopolistic and unfair practices in trade and industry. But this should be accomplished without constantly impeding the natural growth of enterprises, and without hampering every effort of business men to increase the security of both capital and labor by eliminating needless wastes of competition, while moving steadily under competitive pressures toward the most efficient methods and mechanisms of production and distribution.

It can hardly be contended in this day that either the consumer or the worker has been benefited by the hopeless struggle of many small business units to survive against larger, more efficient enterprises. But on the other hand where the small unit is equally efficient, or has a service to perform of special value, and would survive in a field of fair competition, it needs and should receive protection against any oppressive or unfair practices of a more powerful competitor. Snch protection cannot be obtained in the courts and must be sought from an administrative commission adequately empowered to render prompt and efficient assistance.

It will be noted that in the developing field of trade agreements I have suggested the supervision of an administrative agency to give a prima facie sanction to cooperative agreements. The question may naturally arise as to the need or wisdom of delegating this function to a separate agency, instead of conferring it upon the enforcement commission. This separation of functions, is however, to my mind vital in any comprehensive revision of our laws determining the relations between business and government.

When business men approach their government for the purpose of promoting a cooperative program they should go to an agency primarily interested in promoting such cooperation. They should not be required to go to the prosecuting arm of government to obtain a promise of immunity. They should not be regarded as incipient wrongdoers inviting a rebuke and a warning, or seeking to wheedle out of the prosecuting attorney an assurance that he will look leniently on their offense.

But it is inevitable, if such cooperative proposals are presented to the commission charged with the duty of prosecuting wrongdoers, that the commission must, in order to protect the integrity of its position in many pending cases, be exceedingly cautious in sanctioning any agreement that may be subsequently the cause of a complaint. Furthermore later complainants will naturally feel that the case has been prejudiced against them. Whereas if the complaint is sustained the parties to the agreement will be aggrieved at this apparent reversal of opinion by the body on whose approval they had relied.

For these and many other reasons, which will present themselves to any careful student of the problem, it is my strong conviction that there are three parts to any adequate program for revision of the anti-trust laws:

First. Rewrite the substantive law and procedure to express clearly a national economic policy that is consistent and sensible and appropriate for an industrial nation of the twentieth century.

Second. Establish an adequately implemented commission to apply and to enforce the law against monopolistic and unfair practices, with appropriate provision for judicial review of its orders.

Third. Establish an administrative agency authorized to apply the legislative defined policy in encouraging and aiding business men to cooperate in improving the fairness and efficiency of industrial methods. Authorize this agency to give a temporary sanction to any such cooperative agreements which do not violate any of the legal prohibitions of monopolistic or unfair practices. Provide for the review of such sanctions by the enforcement commission upon complaint of the government, or of any competitor, or other person alleging injury as a result of the approved agreement.

In conclusion let me state that I do not believe that any law which has been enacted in the last fifty years, beginning with the Sherman Law and including the National Industrial Recovery Act, has provided any comprehensive or even temporarily adequate solution for the problem of regulated competition. We began with a sweeping prohibition of combinations and conspiracies in restraint of trade. The courts are still trying to interpret and apply that original law; and no one yet knows what it means, or what can or cannot be lawfully done under its vague commands. We have built a superstructure of unintelligible laws and confusing judicial opinions upon this original floating foundation.

We experimented for two years with what some called "industrial self-government" and others called "governmental meddling," and long before the end we learned that neither business men nor government officials knew what they wanted to do, except that everybody wanted to do the other fellow good and wanted the other fellow to let him alone. We can go on floundering a few years longer—or we can take advantage of a period of comparative calm and security to counsel together and try to think part way through this most vital problem of the relations between government and business.

If we look around us we will see nations in the throes of civil wars and on the verge of foreign wars, as the result primarily of maladjustments in an economic system, producing intolerable poverty and social injustice. It should be apparent to our people, just emerging from a severe and dangerous depression, that we must make a major effort to improve the stability and justice of our economic system; and that this effort must have the continuing support of the government and of all those who understand that political freedom and security and economic freedom and security are equally dependent each upon the other.

To all those who expect to live for ten or twenty years more, or who are interested in the happiness of others who will be living ten or twenty years from date, I would address one earnest plea: Let us try now—not next year or the year after—but now—let us try to think this problem through, not as political or economic partisans, but as partners in the general welfare. Let us try to think this problem through while there is time to think and before we are again forced just to act!

At the conclusion of the open forum discussion, Chairman Gallagher inquired: "Mr. Richberg, do you, in the light of anything that has been said, wish to make any remarks or further comments which will sum up the situation to any extent," Mr. Richberg replied:

"Mr. Chairman, I don't wish to make any further remarks except to possibly clear up one misunderstand-

ing that might result from merely hearing rather than reading my previous statements.

"When I referred to the advisability of stating or restating the substantive law, I did not mean to suggest (and I thought it should be clear from other statements made) that I had no thought of writing a different fundamental economic theory. My thought was that we were in fair agreement upon the fundamental proposition that unregulated, private monopoly could not be permitted, which is essentially the doctrine of the Sherman Law. I thought we were also in agreement upon the principle that unfair competition also required government action in order to preserve the actuality of a free, fair competition. It seemed to me that the principles were essentially understood and that the American people as a whole and the influential leaders of opinion are not in disagreement on the principles, but it seemed to me that we lack a sufficient definiteness of statement of those principles in the law, not meaning thereby to go into details.

"I do not believe that anyone with such an experience as I have been through could advise going into an expansion of the statutes into a mass of detailed prohibitions and definitions but the statement of the standards of the economic policy that we are endeavoring to enforce and which in a sort of blind way we have an agreement upon can certainly be improved, to make it clear what we are talking about when we are talking about monopoly, whether we are talking about size or control of the market; to make it clear what we are talking about in unfair competition, whether we are talking about any competition we do not like, or things that are morally unfair or things that are economically unjustified. We are working out those standards. We won't get anywhere unless we try to express them in laws.

"To be quite candid in my comments, the proposition that the matter be left in its present state, in the first place, is a proposition to have the courts undertake legislation, which supposedly is not a proposition that appeals to the Bar of this country when it is thus frankly stated. The Supreme Court of the United States has repeatedly stated in Anti-Trust cases and other circumstances that the determination of economic policy and the laying down of standards was a legislative requirement and that when the court was required to enforce a vague and indefinite requirement such as that of the Sherman Law, combined with certain more definite requirements which add to the confusion, the court is required as a matter of fact to express constantly in its decision some form of its own idea of what should be a sound economic policy with only a limited and inadequate guidance from the Legislature.

"My point is that we ought to begin to approach the end of insisting upon judicial legislation. I am not complaining of the court. The court has done all that it could to endeavor to interpret and enforce a policy without adequate legislative standards and the court in the last year or two has given serious and well-justified criticisms of legislative actions which delegate a vague and indefinite power to the executive to interpret in accordance with the will of the executive.

"But I see exactly the same objection to passing vague and indefinite statutes and leaving them for judicial decision. I might add that the courts are less qualified by their limitations to interpret and to write the details of a policy than an administrative body to whom that duty happens to be delegated.

"So, what I am suggesting here, when I talk substantive law, is not the change, the rewriting, of a new policy. I think the policy of this country is well shaped. I think it is very inadequately expressed and throws an improper burden and responsibility on the courts. The history of the last forty years has proved it is an impossible burden and the courts are unable to sustain it because as a matter of fact we have no definite laws but a law from case to case. That is all the court can do except as it throws out generalities in its opinion which may help to guide you when you have the next case. But it is not the business of the court to legislate the policies of this country or to determine our economic policies. That is not in criticism of the court but in criticism of an absence of legislative action and it seems to me surprising that those who complain about the confusion of powers of government and believe in the separation of the powers of government, as I do, the executive in its sphere, the legislative in its sphere—should want to preserve and continue a situation in which legislative power is practically forced upon the courts and we are left to determine what our law is after the Supreme Court itself has been pricking out the lines in decision after decision to give us some idea of what economic policy we are living under. I think it is time we expressed in sound legislation that which we mean and on which there is a general consensus as to the policy which we would adopt and which, therefore, we should express in adequate legislation.

"I don't want what I said to be misunderstood as suggesting a sweeping change of economic policy. I am suggesting proper and adequate expression of that policy by the body established under the Constitution and that is the legislatures of the several States and the Congress of the United States within the limitations imposed on them by the Constitution."

What Some Local Bar Associations Are Doing

The Legal Aid Society of the Cleveland (Ohio) Bar Association has handled 166,000 cases in the thirty years of its existence. During the past year the Association handled 6,660 cases as compared with 10,392 in 1932.

The Clark County (Ohio) Bar Association is making a survey of methods of handling reckless driving cases resulting from automobile cases in the Municipal Court. The Bar members are especially interested in the practice of withholding sentence upon those convicted of reckless driving until damages caused in accident have been paid to the complaining driver.

At the meeting of the Racine (Wisconsin) Bar Association held in May, the activities of the Home Owners Loan Corporation were discussed in allowing a fee of only $75.00 for a mortgage foreclosure regardless of the amount involved. At an adjourned meeting a resolution was passed condemning the practice of such corporations dictating fees as derogatory to the best interests of the profession. It was further resolved that any member of the Association who continued to perform services at less than the approved rate "shall be forthwith dismissed from the Association."

(*Continued from page 789*)

Some Fundamental and Practical Objections to the Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States

BY HON. EDWARD R. FINCH
Judge of the Court of Appeals of New York

BEFORE considering in detail how the preliminary draft of the Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia if finally adopted will increase litigation and subject those against whom claims are asserted to an increasing number of suits based on unfounded claims, sincere and hearty praise should be given to the American Bar Association for this the first fruits of its efforts continued over a quarter of a century to obtain a simplified procedure in actions at law and equity in the Federal Courts. Deserved praise likewise should be given to the Committee appointed by the Supreme Court for their painstaking work. In general (omitting certain proposed amendments), if adopted these rules will provide a simpler and better procedure for the benefit of all those asserting claims. They will have at the same time increased to an appreciable extent the volume of litigation, unless the rights of a defendant are likewise adequately protected. This because the preliminary draft adds greatly to the nuisance value of litigation brought without just cause. Such adoption will also increase so-called speculative litigation or litigation based upon suspicion rather than facts, with the hope that such fishing may reveal a good cause of action as alleged or otherwise, and if the latter, the original suit will be discontinued and another suit instituted. That such will be the result may be shown by a consideration of the proposed rules in their application to actual litigation.

Theoretically the preliminary draft adopts in their entirety and applies to each and every action, both in law and equity, all those aids to one asserting a claim which those interested in simplified procedure have been urging for years. But those in this group who have been dealing practically with procedural reform as applied to litigation day by day, realize that it is equally important to protect the rights of a defendant who has a just defense.

A lawsuit, at least on the part of those opposing and defending, has always been and always will be a contest. While a Judge must view a lawsuit in the light of a search for the truth, the contestants, within lawful limitations, seek only a victory. Injustice is bound to result if those asserting claims have greater facilities placed at their disposal than is afforded to those against whom suit is brought. If the claims of plaintiffs were always righteous, no objections could be urged successfully to the preliminary draft.

Some students of litigation give weight to the suggestion that a jury often acts as if the plaintiff would not have brought suit unless his rights had been invaded unjustly and it is common knowledge that mass assemblies more readily vote affirmatively than negatively. Here, however, we are concerned not with subconscious inclinations but with litigation brought as a commercial undertaking on a large scale solely for its nuisance value and litigation brought upon speculation that it may prove to be well founded or that at least some other well founded cause of action may be thereby discovered. In consequence we must always view any change in procedure not only for its aid in simplification but also from the angle whether this advantage in simplification may not be outweighed by the aid thereby given to the nuisance value of unfounded or speculative litigation. This laudable desire for symmetry and simplicity of rule must halt when injustice will result upon the application of such rule to any class of cases.

A person asserting a claim should not be given all the advantages here proposed unless at the same time the rights of a defendant are adequately safeguarded.

Those asserting claims without merit wholly for their settlement value and those fishing for a cause of action, should not be encouraged to litigate at the expense of a defendant who is afforded no opportunity to recover his expense however unjustified may be the litigation. At present our rules of legal procedure, both at law and in equity, make it less expensive from a monetary standpoint alone, to say nothing of personal inconvenience and loss of time, to settle any lawsuit, no matter how lacking in merit, rather than to defend. The biggest item of expense in any lawsuit is the item of the attorney's fee, and there is no way in which a defendant may adequately recompense himself for this. The attorney for the plaintiff may limit his charges to a part or perhaps all of the amount recovered, if any, but a defendant has no such refuge. The more examinations and applications to the Court a plaintiff may make, the greater is the nuisance value of the litigation and the expense thrust upon a defendant no matter how meritorious his defense. It is true that a successful defendant may obtain a small bill of costs, amounting usually to $100, but in the average case brought in the highest court of original jurisdiction this is often inadequate to pay the necessary disbursements and constitutes a very small proportion of the total expense involved. In other words we have a situation where a person asserting a claim may pay his attorney out of the proceeds of the amount recovered and both plaintiff and his attorney litigate at the expense of the person against whom the claim is asserted, while the latter is substantially out of

pocket even though he finally is awarded a favorable decision.

Our legal procedure thus puts a premium on litigation brought without merit, and the greater the facilities made available to the person asserting the claim, the more weight is given to his demand upon the person resisting, that it will be cheaper and much more to the self interest of the defendant to settle for less than the cost to resist.

That the above presents not a theoretical but an actual situation is shown by the recent history of litigation in the First Judicial District comprising the Counties of Manhattan and the Bronx in the State of New York. In 1928 the evils attendant upon the open and notorious solicitation of tort cases based on alleged negligence, became so acute that an extraordinary term of the Supreme Court was convened to investigate. The facts uncovered showed a system so systematically conducted that firms of attorneys employed corps of runners or solicitors, each furnished with an automobile and other accessories. Causes of action were manufactured as for example where a torn mat was placed in apartment houses and then retaken to serve as an exhibit. The runners secured retainers on their own account and sold groups of claims to the highest bidder. Casualty insurance companies settled claims in groups for a lump sum, leaving it to the attorney to prorate the sums against the claims as he saw fit with the result that claims by infants received smaller shares, because there the compensation of the attorney had to have court approval.

It may enliven a disagreeable recital to note that following a street accident where the injured person was being removed in a taxicab, a runner forcibly entered the taxicab and applied for a retainer when the cab was forced to stop at the first traffic light. Also a young lawyer only two years admitted to the Bar produced an income of over a hundred thousand dollars a year in dealing with this class of litigation. He believed in volume, and even though he obtained now and then a good cause of action, he settled it for an inadeqate sum as he could produce more income through handling a large number of claims than spending the necessary time on those of real merit. It may be added that disciplinary proceedings were brought against over a hundred attorneys by the Association of the Bar of the City of New York resulting in many disbarments and other punishments. One result was the adoption of a rule by the Appellate Division of the First Department requiring in personal injury actions all retainers where the compensation of the attorney is based upon the contingency of success to be in writing and filed in that Court. The number filed and the great increase from year to year, is illuminating as showing the extent and increase of this kind of litigation in only one form of action and there is some ground for asserting that many such retainers are never filed.

STATEMENTS OF RETAINER FILED BY ATTORNEYS PURSUANT TO RULE 4-A OF THE SPECIAL RULES OF THE APPELLATE DIVISION, FIRST DEPARTMENT.

1929 (beginning February 26)	44,181
1930	66,957
1931	75,621
1932	82,773
1933	86,180
1934	97,846
1935	99,809
	553,367

While we have mentioned and given figures in reference to one form of action alone, namely, suits for personal injuries based on negligence, yet the same situation applies to other forms of action. Take for example actions for libel. There settlements aggregating large sums yearly are constantly being made where there is clearly no cause of action for libel merely because the expense of successfully defending these unfounded suits without any possibility of reimbursement for the expense incurred, is prohibitive.

Thus far we have been dealing with causes of action brought without merit and with the preconceived plan of obtaining from the defendant a sum of money in settlement somewhat less than the expense of defending the action. After a defendant has been served with the summons and complaint, has retained an attorney to defend him and has taken up with this attorney and verified his answer, has been examined before trial and sufficiently annoyed by various other motions, a proposition is made to terminate the litigation by a lump sum payment which is less than the cost already incurred and the future expense, to say nothing of further annoyance and loss of time. The attorney for the defendant must of course report this offer to his client and in answer to the usual query of the client must inform him that the offer is less than the expense which he will incur if the suit is continued to trial and that there is no way for him to recover this expense even though he may be entirely successful on the trial. Under these circumstances it is an unusual defendant who does not terminate the litigation even though he feels the injustice of his situation.

There is a further class of action which will be greatly encouraged by the adoption of the preliminary draft. We refer to those actions which are brought in the hope of discovering some basis for a genuine lawsuit. In this class of action the suit first brought is one which will furnish an opportunity of obtaining the widest possible examination before trial. If upon such examination or other application a sustainable cause of action may be discovered, then if this has not been alleged in the complaint as drawn, the first suit is discontinued and another cause of action brought.

To cure these growing evils we must make the outcome of litigation as fair to the defendant as to the plaintiff. We must revaluate the costs recoverable by the defendant in the event of his success so that they will to some reasonable extent compensate the defendant for the expense to which he has been put in defending an unfounded claim. They should also include an amount which will represent a reasonable counsel fee to the attorney whom the defendant has been compelled to employ by reason of the unfounded lawsuit brought by the plaintiff. A defendant proving to the satisfaction of the court that he has been unjustly sued should not be made to suffer through the wrong of the plaintiff.

It is no answer to say that the plaintiff may not recover a counsel fee as such. The situation of the

plaintiff and defendant in this respect is not identical. Both a plaintiff and his attorney can be compensated from an amount received in settlement from a defendant who has paid less than it would have cost him to fight. There is no fund however on the part of a defendant out of which his attorney may be compensated even though he has been successful in defending the suit.

In opposition to the contention here made, the practice is cited from England, where the costs are much too heavy and multifarious. It is true that England has gone to the other extreme, but it is a far cry from that extreme to our situation where a defendant is afforded practically no protection at all. Our courts are clogged with litigation without merit, to the delay of litigation of merit, and the costs of the Judicial Department are mounting to a point where they may become unbearable.

Objection may be urged that the costs of litigation should not be increased. This objection results from a failure to distinguish between fees and costs. Fees are those charges paid to the State without which litigation may not be commenced or continued. If these fees are too high they may unjustly act as a bar to the prosecution of a meritorious claim. Such a situation should never be allowed to exist. Costs, on the other hand, are the means of reimbursing the successful party for the expense which he has been forced to pay out by reason of the unrighteous suit. If this reimbursement is not provided for, then a poor litigant is at the mercy of a richer opponent. Thus a wealthy defendant may force a poor plaintiff with a meritorious claim to accept an unfair settlement for the reason that the further the litigation is carried the greater the expense which the plaintiff must incur, which continually reduces the amount of his actual recovery unless he ultimately can obtain reimbursement for the costs to which he has been subjected by the unjust defense.

At the same time that adequate protection is afforded to a defendant sued without merit, provision must also be made so that a person without means may be enabled to present a meritorious cause of action. This question is really without practical significance because we have seen that there are more advocates standing ready to take claims on a contingent basis than there are claims sufficient to fulfill the demand. In any event, adequate provision can readily be made available by permitting such persons as are without means to sue as poor persons or in *forma pauperis*. The present statutes, however, should be amended so as to prevent undue advantage being taken of their provisions. No person should be permitted to sue as a poor person unless it is clearly shown that he is in that class.

Furthermore the allowance of all costs and expenses should at all times be in the discretion of the Court or Judge so that a portion of all of such costs could be eliminated for good cause shown.

Discretion also should be lodged in the Court to require security for costs which would prevent the nefarious practice of assigning certain causes of action to impecunious plaintiffs for the very purpose of preventing the recovery of the comparatively small amount of reimbursement by way of costs now allowed to a defendant when he has proven to the satisfaction of the court that the suit was unfounded.

In the consideration of this question we must note that the interests of the clients are adverse to the interests of some lawyers. Just as in England it took a hundred years and a majority of laymen on the Commissions to achieve real procedural reform, so we may find a parallel here. Sooner or later however, clients, laymen generally and taxpayers must revolt at this misuse and abuse of the right to litigate. The presentation of the preliminary draft of the Rules of Civil Procedure for the District Courts of the United States threatens to breed an increase of nuisance litigation and presents an opportunity to remedy an injustice, of long standing but of late becoming yearly more acute, against those sued upon claims without merit.

A Critique of the Federal Court Rules Draft —Three Larger Aspects of the Work Which Require Further Consideration

BY COL. JOHN H. WIGMORE
Dean Emeritus of Northwestern University Law School

THE resumption by the Supreme Court of its natural power and duty, symbolized in this preliminary Draft, may be regarded as the most important event in a hundred years for Federal Justice. Some years ago, I published an editorial advancing the view that, under the tripartite division of constitutional power, the Legislature was no more entitled to make rules of procedure for the Judiciary than is the Judiciary to make rules of procedure for the Legislature. That view may some day find acceptance. But at any rate the power to make rules is now here, and we are to be thankful for it.

As to the *policy* of this way to regulate procedure, there is no longer any professional doubt. But that change of professional conviction has all come about within the last twenty-five years.

The first vote of this Association, recommending the measure to Congress, took place in 1910, after President Taft had recommended such a measure; and each year for nearly twenty-five years it was repeated. The State Bar Associations also

were finally converted to that view. The older members of this Association will recall with admiration the courageous and unflagging leadership of Thomas Shelton of Virginia as chairman of the Association Committee; and at this stage of victory in the battle I know that you will all join in a tribute of respect to the memory of Tom Shelton.

Meanwhile the American Judicature Society, founded in 1913, had placed this measure of Court Rules among its studies and its proposals. It produced in 1919 a model State Code of civil procedure in the form of Rules of Court. The labors of the Judicature Society had the most powerful educative influence during those twenty years. And here too the names should be remembered with gratitude of Harry Olson, Albert Kales (both now departed) and of Herbert Harley, the founder and still active Secretary of that Society.

The personnel of the Advisory Committee, as selected by the honorable Supreme Court, has commanded the entire confidence of the Bar. Their diligent and rational labors in this great task deserve our deepest gratitude.

But a great task like this cannot be achieved instantly. The method of reducing all procedure to Court Rules is so novel that we cannot expect nor attempt to act too speedily. The Advisory Committee's expectation of Jan. 1, 1937, is too optimistic. This is the first Draft before us. There may well be a second and even a third draft before final presentation to the Court.

That is why I will now invite attention to three larger aspects of this draft in which I hope that the Committee will reconsider this draft. In all three respects my comments deal with what the Committee has not done, rather than with what it has done. Those three aspects are, first, the style of drafting, secondly, the incompleteness of the codification, and, thirdly, the substance of the Evidence article.

1. First, as to the style of drafting. I have been a member for nearly thirty years of the National Conference of Commissioners on Uniform State Laws and have taken part in their legislative drafting. I have also, during those 30 years, turned over three separate times the compiled statute book of every State and Territory. So I think that I have learned some lessons about drafting.

The present draft is open to the objection that it has not taken advantage of the latest and accepted models for clarifying such a document. This is apparent in two respects.

(a) In the first place, it does not in its numbering system provide for future additions and amendments. This book of Rules will last for generations and it will be enlarged and changed from time to time. In order to provide for this, the accepted method in all recent drafting is to employ an *expansible numbering system*. By that method, after dividing the whole book into titles and chapters, there is assigned to each title and chapter a single set of one thousand or one hundred numbers or ten numbers. This permits insertion and expansion by using vacant numbers or decimal numbers without changing the original numbers. This is the method regularly advised by the United States Senate Legislative Reference staff. It is already in use in several States; starting in Kansas and Wisconsin, it is now in vogue also in Idaho, Nebraska, New Jersey, New Mexico, Oregon, Utah, and Wyoming. It is being used in some of the Federal departmental regulations, and in some modern Federal Statutes. It is undoubtedly the coming universal method. Its practical advantages, both to Bench and to Bar, in briefing, in citing, in arguing, are unquestionable. A 1936 draft of Court Rules cannot afford to use any other method.

(b) In the second place, this preliminary draft, in its *paragraph and sentence structure*, fails to observe two fundamental rules long ago laid down by the National Conference on Uniform State Laws. They are these:

"3. *Length of Sections.*—(1) Long sections should be avoided. (2) Each proposition that is separable from other propositions should be placed in a separate section.

"4. *Detaching of Clauses.*—Where one section covers a number of contingencies, alternatives, requirements or conditions, it is desirable to break up the section into detached paragraphs or lines distinguished by figures or letters." The advantage, nay even the necessity of this rule, is that it makes for accuracy and speed and lucidity in citing and discussing each separate proposition of law. Failure to observe this rule leads to intolerable waste of time and labor and to constant misunderstanding.

Now in this Preliminary Draft these rules of draftsmanship have not been observed. In every page these rules are violated. You will find therein perhaps a dozen unbroken paragraphs with as many as thirty solid lines. And you will find a dozen or more Rules with from five to ten cumulative paragraphs bearing no number.

Yet it will be very easy to break down these lengthy paragraphs, to number each proposition separately, and to apply the expansible number system to the whole body of rules, thus adopting the two basic principles of modern legislative drafting that I have mentioned. The gratitude of practitioners and judges will thus surely be earned.

Such are the recommendations I venture to make as to the drafting style.

2. Secondly, this draft falls short of attaining one important purpose, viz.: the *simplification* of Federal practice by assembling *all* of the practice rules into this single compilation. Uniformity was of course a main purpose, but codification into a single handbook was also an important purpose.

That purpose has yet been left unfulfilled. The draftsmen state frankly that at numerous points the draft has failed to include relevant rules, for which the practitioner must still refer to the statutes. How many such cases are there? I have counted 128 places where statutes are expressly referred to. Moreover, in some places the reference is in blanket form to many other statutes, as in the following: "*Any* existing statute shall here govern to the extent to which it is applicable." Or like this: "The party may proceed in accordance with the provisions of Sec. 968 Revised Statutes or *any like* statute." The result of these omissions is that the practitioner still has to search all through the statute book to find the rest of the rules. Was this necessary? I submit that it was not necessary. It would be easy to reproduce the terms of the statute in these Rules. This Code will fail in an important purpose if it does not seek to be complete in itself.

3. My third recommendation concerns the sub-

ject of *Evidence*. Jeremy Bentham once wrote, "Evidence is the basis of Justice." It is in Rule 50 of the Draft that, in my opinion, a great opportunity is as yet inadequately dealt with. This is not the place either to criticize the details of the Preliminary Draft or to describe any proposed substitute. But I think that it is the place to call the profession's attention briefly to the needs of that branch of the law in Federal practice—needs that are not satisfied in this draft.

The truth is—though some of you may regard this statement as an exaggeration—that the law of Evidence in our Federal Courts is in a most deplorable condition. It is *inferior* to that of any of the fifty States and Territories—I say, inferior to *any* of them, and not only inferior but far inferior.

It is inferior for at least three separate reasons. I will state briefly those three reasons; and at the same time I will assert that each one of those three reasons can be remedied in this Draft by simple measures, which involve no controverted issues and which could be prepared and agreed upon in a day or two of conference.

You will of course understand therefore that I am not about to recommend a complete *code* of Evidence rules. By no means should we attempt to offer an Evidence code. That may have once been a dream of some of you. But it is not feasible in these Federal Rules, for the simple reason that no such accepted code yet exists in any State, and that the task of securing agreement upon it would be probably as large an undertaking as this whole preliminary draft now before you. Nor do I mean that the new Court Rules should assume the role of reforming any of the rules of Evidence that now need reform. That task may come later, but not now.

What the Federal practice in Evidence rules now needs is merely to re-state and to make lucid the present confused and intolerable and inferior condition of the *existing* Federal law.

Now the three reasons for that unfortunate condition are as follows:

1. The *first* reason is the inconsistent and incoherent language of the Conformity statutes. There have been four different statutes dealing with conformity, enacted at different periods, and all differing in their wording; and more than four hundred judicial rulings have been made in the effort to interpret them in their application to the Rules of Evidence. One of these statutes prescribes conformity in "the rules of decision in trials."

Another prescribes non-conformity in "the mode of proof in the trial of actions."

Another prescribes conformity in "the rules of decision as to the competency of witnesses."

And still another provides for conformity in "the practice pleadings and forms and modes of proceeding."

Each of these statutes uses a different definition of the scope of conformity. The result is that the ten circuits and the scores of districts now find themselves in an almost hopeless state of confusion with over 400 interpretative rulings on the Federal law of evidence. I say *almost* hopeless; but I for one have long ago given up hope of being able to state what *is* the Federal law on *any* rule of Evidence. I merely note the tenor of the new ruling and file it away where it seems to belong on top of the preceding mass of rulings.

This state of things is unworthy of Federal practice. It would be a scandal to any system of practice. It ought not to be longer tolerated. And it is quite needless. A re-statement of the Conformity rule can readily be made in concise form. And today, in this new era of Court Rules, is the great opportunity.

2. The *second* reason for the confused and inferior condition of the Federal rules is that they are scattered throughout the Code. To try a case, the practitioner must re-study the whole Code, to make sure of being ready to use all the applicable rules. What is needed is merely to re-assemble, in the Evidence chapter the chief rules now scattered elsewhere. By "chief rules" I mean not all of them, for there are scores and scores in all, but only the rules that are likely to be applicable in the general run of cases. Thus the practitioner will be able to find collected in one place those principal rules. This does not mean to reform these rules. It does not even mean to repeal their statutory status. It means merely to repeat and re-assemble them as Court Rules in the place where they belong and where they are needed.

The task would be an easy one—merely a matter of industry and accuracy. Nor would it involve any controversial subjects.

3. The *third* reason for the confused and inferior condition of the Federal rules is that they lack any simple and definite rules for using documentary evidence. Documentary evidence comes into nearly every trial, and it usually involves merely a few well-settled rules of thumb. Most States have such simple and general rules; the California Code of Civil Procedure has half-a-dozen generalized rules, which are so easily workable that during the last 60 years they have called for no more than a dozen judicial rulings on the whole subject. The Federal laws, on the contrary, not only lack any general rules, but do contain several scores of statutes, scattered through the whole Code, but each dealing with documents of some limited and petty sort—for example, postmaster's accounts, consular records, the clerk's records in the Western district of North Carolina, and so on.

The general principles underlying these particular statutes can all be assembled in concise tangible form in this Evidence article. But for lack of such rules everyday's practice is needlessly expensive and uncertain.

A recent case is typical. In the trial in the Iowa District, last year, of some of the conspirators in the Sir Francis Drake Estate swindle, it was of course necessary to prove Sir Francis Drake's will dating three centuries ago. The will notoriously is preserved in London, in Somerset House where wills are registered. The certified copy of it was supplied to the prosecution in the regular and simple mode in which such a document could be proved by English law or by California law. But the Federal judge could find no Federal statute applicable to such a document, and it was excluded. So when the next trial took place, this spring, in Chicago, the prosecution, determining to be well fortified on that point, produced a bundle of certificates and seals which reached almost up to the King himself and would have filled a basket. The incident was re-

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CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

CRIMINAL ACTIONS in the Common Pleas Courts of Ohio, by C. E. Gehlke. 1936. Baltimore: The Johns Hopkins Press. Pp. 326.—This work is a statistical study of the criminal actions in the Common Pleas Courts of Ohio, covering every county in the state for the first six months of 1930. The study was projected by the Institute of Law of the Johns Hopkins University. It is a revealing work from the point of view both of the factual information it discloses and the light it sheds on various commonly accepted beliefs about the administration of the criminal law. The study reveals that jury trials produced the highest percentage of imprisonment. Next in order were pleas to lesser offenses, pleas to the original charge, and lowest, those tried by the judge. Somewhat over one-half of the defendants for the entire state were found guilty; the urban counties had a record of nearly two-thirds guilty defendants, while only fifty-five per cent of the defendants in the rest of the state were found guilty. There were no pleas of insanity in the data, and only four per cent of the cases showed use of continuances.

A percentage of conviction below the average for all crimes was secured in embezzlement and non-support, and in liquor and traffic violations; the highest percentage was secured in rape, robbery, homicide and burglary. Robbery far outranked all other offenses in length of imprisonment and was followed by homicide and rape. Only a small percentage of the defendants were granted new trials, and they were found guilty more often than defendants in general. The cases in which guilt was not established took, on the average, a comparatively longer time to try; those in which guilt was established were usually tried quickly. Delays were found to occur in the stages before the cases were set for trial; once these dates were set, there was little delay in disposing of the cases. Surprisingly enough, the study found that trials by jury took little time, and that the selection of the jury was nearly always completed the day it was begun. "Improvement," Mr. Gehlke here comments, "must be sought in the administrative phases, not the trial phases of criminal justice."

Some of Mr. Gehlke's general observations and conclusions are noteworthy. "Compared with the snail's pace of the civil courts," he states, "our criminal courts are swift." In discussing the current belief that the court system of this country is better adapted to the problems of rural than urban justice, he observes, "We find no evidence to support this view in our figures. . . . Certainly," he continues, "those critics of the courts who see in every defendant not guilty a failure of justice and in every sentence under the maximum a weak yielding to crime will have difficulty in proving the greater defectiveness of urban as compared with other courts in Ohio in the first six months of 1930." Actually the urban counties had a more severe standard of assessing punishment though they used probation more frequently. On the effectiveness of the court as an agency in criminal law administration, he believes that "no alternative system of ascertaining guilt would have any claim on perfection of result." But the treatment of offenders is quite another matter, and a good case, in his opinion, "can be made for removing this function" from the courts. The change which would have the greatest single effect on the speed of criminal trials "would be elimination of the grand jury."

Another broad observation is that "justice of the trial is the exception, justice of the conference the rule." Only 772 defendants of the 7,505 considered in the data were tried. Whether we like it or not, he notes, we have turned the field over to the prosecutor, and "all the elaborate safeguards to protect the defendant, and the public, are utilized in about ten per cent of the cases that go to trial. . . . The vaunted superiority of our Anglo-Saxon system over the Continental systems," he continues, "pretty largely disappears when we observe that fundamentally the life or death of a case is in the hands of an official whose acts are by no means as subject to check as, for example, those of the French *juge d'instruction.*"

Much has been written in recent years about the need for individualization of punishment. According to Mr. Gehlke, we have individualization of a kind. He believes we have in practice completely abandoned the classical principle which made the punishment fit the crime, "except for the fragmentary survivals in the form of minimum and maximum punishments." He builds up an impressive, though perhaps a too optimistic, argument that individualization of punishment is actually being employed. He points out that we have probation, the suspended sentence without probation, nominal sentences, modified sentences after imposition, and pleas of guilty to lesser offenses "in which there is no theoretical limit to the variety of sentences that may be imposed." A sentence pronounced by the judge, he comments, where an indeterminate sentence provision applies, "is no more than the expression of a pious wish that the defendant may in some degree or other suffer for his crime." But while we have the machinery for individualization, he expresses the view that the basis is faulty, in that we do not have a rational and scientific program of treatment for the criminal. Courts must continue to function to determine the guilt factor, but they "have neither the clear philosophy, the techniques, nor the personnel" to perform the responsible task of determining what to do with the criminal after he is found guilty.

Mr. Gehlke has made an exceedingly valuable study. The work illustrates what can be done with sta-

tistics when in the hands of a master of the statistical method. The materials presented should be very helpful and stimulating to students of criminology and of criminal law administration. Beyond that, they should become a model for further studies of this kind.

ALBERT J. HARNO.

University of Illinois.

Income Tax Codification Committee (United Kingdom of Great Britain-Ireland); Report, with Draft of an Income Tax Bill. London: H.M. Stationery office. 1936. 2 Vols. Pp. (Vol. I) 541; (Vol. II) xxii, 285.—The following extracts show what this able and distinguished committee thinks, in general, of the text of the British income tax laws:

"Unhappily the actual language in which many of the statutory provisions are framed is so intricate and obscure as to be frankly unintelligible."

". . . amendments . . . are too often framed without sufficient regard to the basic scheme upon which the Acts originally rested. . . the method of income tax legislation since 1907 might not inaptly be described as one of improvisation."

As one example of unsatisfactory terminology, the report shows that the word "assessment" is employed in the existing legislation in no less than eight different senses.[1]

After tracing the history of income tax legislation since the two main statutes of 1842 and 1843, the report continues:

"By 1918 the form of the legislation, awkward and unwieldy to start with, had become still more confused by the accumulation of amending enactments passed in haphazard fashion in the preceding 76 years. . .; by this time no fewer than fifty-two Acts of Parliament existed to embarrass the taxpayer and his advisers and the officials whose business it was to administer the tax. . ."

The Income Tax Act, 1918, was technically only a consolidation of the income tax provisions, and hence "did little to eliminate overlapping or inconsistent provisions." Eighteen Finance Acts had been passed since 1918 up to the time of the report, of which only one made no alteration in the income tax law, until, as the report says, "the fabric has become overlaid with incongruous patches.

This committee, appointed by the Chancellor of the Exchequer, was required to limit its endeavors to recasting the law so as to make it as intelligible as possible, leaving substantially unaffected the liability of the taxpayer. As to this, the report well concludes that to expect "a codification * * * which the layman could easily read and understand was a vain hope, which only the uninstructed could cherish." After showing that the income tax necessarily affects innumerable phases of the nation's economic activities, public and private, the report says:

"A statute which professes to cover this vast field, including at the one end the simple finances of the salaried clerk and at the other the complicated intricacies and ramifications of our great banks, insurance companies, international finance houses and commercial and industrial companies, cannot avoid being as comprehensive and as complicated as the subject-matter with which it deals."

These assertions are obviously true, not merely of England's income tax laws, but of ours. They remind us that the complexity of our own income tax laws can never be removed by mere skill in draftsmanship. To simplify our laws we would have to make radical changes in the substance of them.

At first glance it seems surprising that we have excelled the British in draftsmanship, but this is explained when we note the profound difference between the methods of initiating finance acts here and in Great Britain. There, revenue bills are introduced by the Chancellor of the Exchequer and not by members of Parliament, and the Chancellor is protected from the dangers of a general revision of the tax laws so long as he confines any bill to specific needed changes. For many years no Chancellor, apparently, has thought that the advantages to be gained from a general revision were sufficiently great to counterbalance the probable evils of opening up the whole field to parliamentary discussion.

If we have better-drawn laws than the British, why is it that our laws nevertheless work less satisfactorily either from the standpoint of our government or from that of our taxpayer? Among uncountable differences between their system and ours, the main answer appears to be that in Great Britain, unlike the United States, (a) the administration of tax laws is non-political both as regards the selection of personnel and the policies pursued; (b) the quality of the British Civil Service is very high, and able tax officials attached to that service have powerful influence in tax legislation and administration; (c) great weight is given to accounting practices and to the judgment of the chartered public accountants of Great Britain; (d) in the laws and in the administration of them, the taxing powers are carefully separated from the regulatory powers of government, and (e) revenue laws originate with the executive rather than with the legislative branch.

The Financial Secretary of the Treasury and the members of the Board of Inland Revenue, together with the subordinate personnel, are all members of the Civil Service, those in the higher positions having usually earned such distinction by success in other inland revenue responsibilities. Furthermore, the Chancellor of the Exchequer is without power, and would not try, to direct any of these officials as to what decision he should make in construing a revenue law, nor is any part of this personnel affected by the fall of one ministry and the rise of another. It is true that there is a kind of balance of power between the Chancellor of the Exchequer and those who are responsible to the King for the collection of the revenue, in that the tax officials must work through the Chancellor of the Exchequer to get needed legislation, and that the Chancellor of the Exchequer must rely on the tax officials to collect the needed money for the operation of the government, but neither controls the other; the Cabinet minister is under no temptation to direct the policies of the Board of Inland Revenue in a manner which would help his political fortunes, because he has no right to direct them at all.

The recently noticeable tendency here to use the taxing power and the taxing agencies as a means for influencing the conduct of citizens—to impose fines and treat them as taxes—is hardly evident in Great Britain. Obviously, the merely regulatory powers of government and the more vital taxing powers do not mix well, and Great Britain is the gainer by not trying to mix them.

The fact that members of Parliament may not introduce revenue bills, nor set in motion amendments tending to increase the burden of tax, in large degree

1. The Committee recommends that the word "assessment" be henceforth applied to the process of fixing officially the amount of income which is an element in the determination of the tax. The word "charge" is recommended for use in relation to the amount of tax,—the principal sense in which we use the word "assessment."

prevents members from making political capital out of revenue measures.

These differences are worth observing,—not so much in the hope of changing our own methods of government, as of understanding that, with such deep differences, there is very little chance that our own situation can be improved by following superficial British analogies. Our problems must be independently solved, having our own institutions in mind, with all their peculiarities.

In reading this scholarly report, which goes into very minute detail and represents eight years of work by the committee, the natural question is, How soon, if at all, is the "Draft of an Income Tax Bill" which forms Volume II of the report, likely to be enacted into law? This is a hard question to answer. Probably it will take at least a year, perhaps longer, for the Board of Inland Revenue to study the draft and to form its own conclusion as to whether or not each of the many changes suggested can be said to leave the taxpayer's liability substantially unaffected. It seems quite likely that, at a large number of points in the draft, the Board of Inland Revenue will differ with the committee and will oppose the committee's suggestion as involving a change of substance as well as of form. It also seems not unlikely that the new and somewhat theoretical classification of income suggested by the committee will appear too cumbersome to men who have had large experience in the practical operation of the tax laws. The advice which the Chancellor of the Exchequer receives from these experienced men who are now studying it will necessarily influence his attitude toward the draft. Perhaps the bill which he eventually supports will differ in many respects from the committee's draft, and will be introduced only if the Chancellor of the Exchequer can be assured that such a bill will not open the door to general controversies on substantive questions of taxation and thus endanger the present taxation policies.

The impartial, exhaustive and helpful manner in which committees of this type function in Great Britain, and the extent to which use is afterward made of such work, may well stimulate us to employ similar methods in attempts to improve our revenue laws, and the administration of them.

ROBERT N. MILLER.

Washington, D. C.

Maritime Neutrality to 1780, by Carl J. Kulsrud. 1936. New York. Little Brown and Co. Pp. 351.—A busy lawyer engrossed in his day to day affairs may look at the above title and say to himself that such a book has no bearing upon his interests. Why should he bother with a tome which appears to deal with matters of purely antiquarian concern and what has maritime neutrality before 1780 to do with vital issues of the present? The answer is that a work such as this which is remarkably lucid in its explanation of complicated doctrines throws a flood of light upon America's as yet unsettled neutrality problem. If and when the "inevitable" (or is it a case of "thinking makes it so"?) European war occurs, our citizens will again be confronted with the old, old problems of visit and search, contraband, "free ships free goods," continuous voyage and blockade. What do those terms mean? How did they arise?

In Mr. Kulsrud's book is found a clear analysis of the origins and development of these terms which undoubtedly will be bandied about loosely and uncomprehendingly by the public and the press during our "next" neutrality period. Certain neutral "rights" will be championed and possibly fought for as if they were eternal and God-given rules, just as the members of the Armed Neutrality of 1780, the Scandinavian states and Russia, proclaimed as "natural" and "right" certain principles which happened to coincide with their neutral interests at the moment. The author takes as his starting point the famous manifesto of the northern neutral powers of 1780 which laid down certain principles in regard to neutral rights. The promulgating nations announced that they were prepared to support their statement with force against the belligerents and claimed to be acting on behalf of morality and civilization. Subsequent tradition has virtually sanctified the assertions of the 1780 neutrals who all too frequently have been regarded as a particularly brave and enlightened little band of pioneers for civilization.

Mr. Kulsrud's thesis is to the effect that the 1780 Armed Neutrality asserted neutral rights which had little basis in the facts of international law of that day and that "to it has been attributed reforms which actually were effected under different conditions and in time of peace, in the following century." (p. 12.) He proceeds to demonstrate that God and the angels were not necessarily on the side of the neutrals, that belligerents in general and Great Britain in particular were not agents of the devil, and that A. P. Bernstorff, the Danish drafter of the platform of the League, was calculating shrewdly the benefits which would flow to Danish commerce from an application of the enunciated doctrines. What is supremely important for the contemporary observer is to note that neither belligerent nor neutral is absolutely right; no higher moral law, deducible by Grotius' famous "right reason", governs the relations between contestants and non-participants in a war. The laws in regard to neutrality are compromises between neutral and belligerent interests and are the result of a long history of adjustments. It is human and natural to identify one's interests with universal law but it is certainly not accurate.

To support his contention that the 1780 formulation of neutral rights was out of line with contemporary legal rules, Mr. Kulsrud traces the history of visit and search, contraband, "free ships free goods", continuous voyage and blockade from the beginnings of the modern state system. Neutrals on the one hand desired to trade during war as in peace while belligerents sought to stifle all trade with the enemy by restricting neutral business to the limit. Result: a series of compromises in the form of practices regulating the manner and methods by which neutrals might engage in commerce. The clash of interests between the United States and Great Britain and between the United States and Germany from 1914 to 1917 fundamentally was nothing new. "Plus ça change, plus c'est la même chose!" The early background, from the thirteenth century on, is all there in Mr. Kulsrud's volume, described in a manner so crystal clear that any layman may understand with ease.

The author has done a brilliant job in relating the tortuous tale of diplomatic and commercial struggles so simply and plainly. To any one who has ploughed through earlier histories of the evolution of doctrines like that of "free ships free goods", a veritable maze of conflicting treaties, court decisions and diplomatic notes, the present treatment comes as a powerful and welcome relief. This book is a fascinating and complex story well told, as well as a timely reminder that neutrality

has a long history and is not to be comprehended in terms of moral issues.

PAYSON S. WILD, JR.

Harvard University.

THE ORIGIN OF THE RULE-MAKING POWER AND ITS EXERCISE BY LEGISLATURES

(*Continued from page 775*)

which are handed down do little more than confuse, are generally lacking in perspective and merely add more burdensome detail to accommodate particular cases.

The aim of all advocates of procedural reform is simplicity. After eighty years of experience with codes of procedure we must admit that the dream of the David Dudley Fields[30] was false. Admirable as their desire may have been to end the absurdities of the existing system they merely exchanged for it a regime which, in the words of one authority, has made practice at law in some respects more complicated than that of the time of Lord Hardwicke.[31] While experience has shown that courts formulate rules which raise as few problems of construction as possible, practice acts inundate the courts with time-consuming and expensive questions of interpretation. Some of this statutory construction, because of exasperation, is undertaken in a hostile manner and has been the cause of much criticism, but it is difficult not to excuse the judges for their impatience with a system which, when it does not tie their hands, confronts them with ambiguity and meaningless generalities. Instead of being free to devote their efforts to the task of administering justice, the courts find their time consumed with petty details of practice.

As things now stand there is a divided responsibility which remains an obstacle to progress. It is impossible to fix the blame for inefficiency, for the courts and the profession retort with indignation that they are inadequately equipped with tools and the legislators declare in turn that they are constantly bending their best efforts to the modernization of procedure only to be met with hostility and aversion to change on the part of the practicing lawyers and judges. It is possible there is a certain amount of insincerity in both contentions, but it is unnecessary to pass judgment on them at this time. For years it has been evident that the entire responsibility for the administration of justice must be placed in one body and, since a large part of it is already in the hands of the courts by constitutional mandate, the rest should be conferred upon them by statute. Familiar with the problems of practice from daily contact they can formulate rules and regulations which will have a fairer prospect of successful application than the clumsy and overparticular products of legislation. And if any incentive toward a free and enlightened exercise of such a power is necessary beyond the remembrance of 80 years of legislative dictation, it will be found in a clear responsibility to the public for the administration of justice.[32] We have Field and his school to thank for this service, that they have proved the impracticability of codes of civil procedure. They have also warned the courts what may result from inattention to duty. Restore to the judges their prerogative and they will be little disposed to provoke another usurpation by the sin of complacency.[33]

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF MARCH 3, 1933

Of American Bar Association Journal published monthly at Chicago, Illinois, for October 1, 1936.

State of Illinois } ss.
County of Cook }

Before me, a Notary Public, in and for the State and county aforesaid, personally appeared Joseph R. Taylor, who having been duly sworn according to law, deposes and says that he is the Business Manager of the American Bar Association Journal and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management (and if a daily paper, the circulation), etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 411, Postal Laws and Regulations, printed on the reverse of this form, to wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are:

Publisher American Bar Association: Harry S. Knight, Secretary, Sunbury Tr. & Safe Dep. Bldg., Sunbury, Pa.

Editor-in-Chief: Edgar B. Tolman, 30 N. La Salle St., Chicago.

Managing Editor: Joseph R. Taylor, 1140 N. Dearborn St., Chicago.

Business Manager: Joseph R. Taylor, 1140 N. Dearborn St., Chicago.

2. That the owner is:

American Bar Association, 1140 N. Dearborn St., Chicago, Frederick H. Stinchfield, President, First National-Soo Line Bldg., Minneapolis, Minn., Harry S. Knight, Secretary, Sunbury Trust and Safe Deposit Bldg., Sunbury, Pa., John H. Voorhees, Treasurer, Bailey-Glidden Building, Sioux Falls, S. D.

3. That the known bondholders, mortgagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: There are none.

4. That the two paragraphs next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders as they appear upon the books of the company but also, in cases where the stockholder or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that the said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds, or other securities than as so stated by him.

Joseph R. Taylor, Man. Ed., & Bus. Mgr.

Sworn to and subscribed before me this 29th day of September, 1936.

(Seal) Helen P. Lovelace.

(My commission expires November 1, 1939.)

30. Even Field, apparently, was not in favor of having the legislature go to the length of dotting the i's of procedure. See Report of the Board of Statutory Consolidation of the State of New York (1912).

31. Hinton, Court Rules for the Regulation of Procedure in the Federal Courts, Suppl. to March, 1927, Am. Bar Assn. Journ. p. 8.

32. The embarrassment of being held responsible for the inefficient administration without the power to remedy it has been voiced by the judiciary. See Finch, Judicial, in Place of Legislative, Court Procedure (1933), 10 N. Y. U. L. Q. Rev. 360.

33. For an expression of the feeling that courts have brought legislative interference upon themselves see Winslow, A Legislative Indictment of the Courts (1916), 29 Harv. L. R. 395.

REPORT OF THE JUDICIAL CONFERENCE

THE Judicial Conference provided for in the Act of Congress of September 14, 1922 (U. S. Code, Title 28, sec. 218), convened on October 1, 1936, and continued in session for three days. The following judges were present in response to the call of the Chief Justice:

First Circuit, Senior Circuit Judge George H. Bingham.

Second Circuit, Senior Circuit Judge Martin T. Manton.

Third Circuit, Senior Circuit Judge Joseph Buffington.

Fourth Circuit, Senior Circuit Judge John J. Parker.

Fifth Circuit, Senior Circuit Judge Rufus E. Foster.

Seventh Circuit, Senior Circuit Judge Evan A. Evans.

Eighth Circuit, Senior Circuit Judge Kimbrough Stone.

Ninth Circuit, Senior Circuit Judge Curtis D. Wilbur.

Tenth Circuit, Senior Circuit Judge Robert E. Lewis.

The Senior Circuit Judge for the Sixth Circuit, Judge Charles H. Moorman, was absent, and his place was taken by Circuit Judge Xenophon Hicks.

The Chief Justice invited the Chief Justice of the United States Court of Appeals for the District of Columbia to attend the Conference, and, on his suggestion, as he was unable to attend, Mr. Justice Groner was present in his stead.

The Attorney General and the Solicitor General, with their aides, were present at the opening of the Conference.

State of the Dockets.—Number of Cases Begun, Disposed of, and Pending, in the Federal District Courts.—Upon the request of the Chief Justice, the Attorney General submitted to the Conference a report of the condition of the dockets of the Federal District Courts for the fiscal year ending June 30, 1936, as compared with the previous fiscal year. Each Circuit Judge also presented to the Conference a detailed report, by districts, of the work of the courts in his circuit.

The Conference was thus advised by the Attorney General of the comparative number of United States and private civil cases, exclusive of bankruptcy cases, commenced and terminated during the fiscal years 1935 and 1936. The report of the Attorney General disclosed the following:

Commenced		*Terminated*	
1935	*1936*	*1935*	*1936*
35,917	39,227	37,287	41,384

The Attorney General submitted the following comparative statement of pending cases, civil and criminal, as of June 30, 1935 (revised) and June 30, 1936:

Pending cases—	*1935*	*1936*
United States civil cases	15,265	13,715
Criminal cases	11,469	10,886
Private suits	32,067	31,460
Bankruptcy cases	61,703	58,910
Total	120,504	114,971

There is thus a decrease not only in the total number of pending cases at the close of the last fiscal year but also a decrease in each class of cases above described.

As has frequently been observed, statistical statements of totals, even of a specified class of cases, do not furnish an adequate basis for estimating the extent of judicial work or the efficiency with which it is prosecuted. Such totals do of course give a general idea of the movement of litigation.

Last year the Conference was greatly aided in its appreciation of the condition of work in the federal courts by the new system which the Attorney General had established. This system has been followed, and an even more elaborate classification of cases has been made, in presenting the statistics for the last fiscal year. The effort of the Attorney General to supply accurate information which will permit a fair conspectus of the state of the dockets in the different districts is highly commended. The subject is receiving expert attention for the purpose of securing improvements in method, whenever practicable.

One of the most helpful of the statistical tables submitted by the Attorney General is one showing the time required to reach the trial of civil cases after joinder of issue. It is gratifying to note, as the Attorney General states, that it appears from this tabulation that in 51 out of a total of 85 judicial districts the business of the district courts is current, that is, all cases ready for trial are disposed of at the term following joinder of issue. This means that there are no arrears except as to cases continued at the request of counsel. The improvement is shown by the fact that in the fiscal year ending June 30, 1934, there were only 31 districts of which that could be said, and in the fiscal year ending June 30, 1935, it was true of 46 districts.

It also appears that in the last fiscal year this condition obtained not only in the 51 districts above mentioned but also in certain divisions of 9 other districts and as to certain classes of business in 6 additional districts. It is stated that in some of the 51 districts above mentioned equity cases may be tried even between terms as soon as ready.

In 16 districts the average interval between joinder of issue and trial is reported as not exceeding 6 months, and in only 18 districts are there delays of over 6 months.

It is thus apparent that the question of delays in the hearing of cases is one that should be considered with respect to particular districts. The Conference in recent years repeatedly called attention to the serious congestion and delays that were found in the Southern District of California and in the Southern District of New York and recommendations were made for the appointment of additional district judges. These recommendations have been followed by action of the Congress and important gains have been made. In the Southern District of California, as reported by the Attorney General, the average interval between joinder of issue and trial in ordinary course has been reduced from 18 to 8 months. It is hoped that the recent appointment of additional judges in the Southern District of New York will lead to a similar improvement. Further assistance, by special designa-

tion, for the Southern District of New York is also rendered possible by the appointment of an additional judge for the Eastern District in that State.

The Senior Circuit Judges submitted reports with respect to the situation in particular districts where delays have occurred and all practicable efforts are being made to insure promptitude in the disposition of cases.

Provision for Additional District Judgeships.—In 1935 the Conference recommended that additional judgeships be provided as follows:

Two additional district judges for the Southern District of New York;

One additional district judge for the Northern District of Georgia;

One additional district judge for West Virginia;

One additional district judge for the Western District of Missouri;

One additional district judge for Louisiana;

One additional district judge for Kansas;

One additional district judge for Oklahoma.

In accordance with these recommendations the following provision has been made by the Congress:

Two additional district judges for the Southern District of New York;

One additional district judge for the Northern and Southern Districts of West Virginia;

One additional district judge for the Eastern and Western Districts of Missouri;

One additional district judge for the Eastern, Northern and Western Districts of Oklahoma.

In addition to the additional judgeships recommended by the Conference, the Congress also made provision for:

One additional district judge for the Eastern and Western Districts of Kentucky;

One additional district judge for the Eastern District of Pennsylvania, with the limitation that when a vacancy occur in the office of district judge for that district it should not be filled, and thereafter there should be but three district judges in that district.

After reviewing the condition of work in the various districts, the Conference at the present session recommended that the following additional district judgeships should be provided:

One additional district judge for the Northern District of Georgia;

One additional district judge for the Eastern District of Louisiana;

One additional district judge for the Southern District of Texas;

One additional district judge for the Western District of Washington.

Circuit Courts of Appeals.—The reports of the circuit judges show that the circuit courts of appeals generally are well up with their work. Circuit Judge Wilbur submitted a request that the Conference recommend that two additional circuit judges be provided for the Ninth Circuit. In view of this request the Conference appointed a committee to consider the necessities of the Ninth Circuit, including the question of the practicability and desirability of a change in the territorial division of States among the Eighth, Ninth and Tenth Circuits,—the committee to report at the next session of the Conference. Further, as proposed by Circuit Judge Wilbur, the Conference appointed a committee to consider the advisability of amending § 212 of Title 28 of the United States Code in relation to the constitution of the circuit court of appeals, with particular reference to those circuits in which there are now more than three judges,—that committee also to report at the next session of the Conference.

Delay in Imposing Sentences in Criminal Cases.—The Attorney General submitted a statement in relation to the "prevailing tendency" in some district courts to delay sentence in criminal cases, even when there is "no impediment" operating against such imposition. The Attorney General's statement related only to "instances where, after conviction, the court postpones the duty of imposing judgment from time to time, or from term to term, meanwhile permitting the defendant to go where he will without restriction." The procedure to which reference was thus made did not involve cases where under the applicable statute there was resort to probation. The Attorney General submitted a number of illustrations.

The practice thus challenged is disapproved. The attention of district judges is directed to the provision of the Criminal Appeals Rules promulgated May 7, 1934, by the Supreme Court of the United States. Rule I provides as follows:

"1. *Sentence.* After a plea of guilty, or a verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, and except as provided in the Act of March 4, 1925, c. 521, 43 Stat. 1259, sentence shall be imposed without delay unless (1) a motion for the withdrawal of a plea of guilty, or in arrest of judgment or for a new trial, is pending, or the trial court is of opinion that there is reasonable ground for such a motion; or (2) the condition or character of the defendant, or other pertinent matters, should be investigated in the interest of justice before sentence is imposed.

"Pending sentence, the court may commit the defendant or continue or increase the amount of bail."

Amendment of Section 24b of the Bankruptcy Act.—The Conference appointed a committee to consider the advisability of amending §24b of the Bankruptcy Act with respect to the allowance of appeals.

Rules of Civil Procedure for the District Court of the United States and the Supreme Court of the District of Columbia.—This session of the Conference afforded an opportunity for the discussion of questions raised by the preliminary draft of Rules of Civil Procedure as prepared by the Advisory Committee appointed by the Supreme Court. Advantage was taken of this opportunity and views were presented and discussed on a number of important points. These views and the discussion will be submitted to the Supreme Court.

Appointment of Official Stenographers.—The following resolution was adopted by the Conference:

"Resolved that it is the sense of the Conference that provision should be made for the appointment of official stenographers for the reporting of trials in the district courts. It is not necessary that salaried offices be created. The need would be met by an act authorizing the district judge of each judicial district to appoint one or more official court stenographers for that district, and to fix by rule of court the compensation which such stenographers shall be entitled to charge for their services, with provision that amounts properly paid by parties for the service of such stenographers be taxable as costs in the case in the discretion of the trial judge."

Clerical Salaries in the Southern District of California.—In view of a request from all the district judges of the Southern District of California for an increase of clerical salaries in that District (based upon a detailed statement of the urgent need therefor), and of correspondence with the Department of Justice relating to that subject in which the lack of adequate appropriations for the purpose is emphasized, the Conference resolved that the request be referred to the Attorney General for such consideration as he may find to be appropriate.

Rules of Circuit Courts of Appeals as to Procedure on Petitions to Review Decisions of the Processing Tax Board of Review.—Referring to the provision of §906(g) of the Revenue Act of 1936, authorizing the Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia to adopt rules "for the filing of petitions for review, the preparation of the record for review, and the conduct of the proceedings on review," the Conference adopted the following resolution:

"Resolved that each of the Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia add after the rule relating to petitions to review decisions of the Board of Tax Appeals a rule relating to a review of decisions of the Board of Review as follows:

"BOARD OF REVIEW.

"The procedure on petitions to review decisions of the Board of Review established in the Treasury Department by Section 906 of the Act of June 22, 1936, shall be the same as that prescribed by these rules for review of decisions of the Board of Tax Appeals; and the provisions of Rule ——* shall apply to such petitions to review decisions of said Board of Review, except that where the words 'Board of Tax Appeals' occur in said rule the words 'Board of Review' shall be understood as applicable."

Representation, in the Conference, of the United States Court of Appeals for the District of Columbia.—The Conference adopted a recommendation that the Act constituting the Conference (28 U. S. C. 218) be amended so as to provide for attendance at its sessions, as a member of the Conference, of the Chief Justice of the United States Court of Appeals for the District of Columbia or of such other justice of that Court as he may designate.

For the Judicial Conference:

CHARLES E. HUGHES,
Chief Justice.

October 3, 1936.

*The reference is to the particular rule of the appellate court.

OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS

Opinion 162

(August 22, 1936)

Articles on Legal Subjects—It is not unethical for an attorney to write articles on legal subjects for magazines or newspapers, and the fact that publication is in a trade journal makes no difference.

Advertising—Free Legal Advice to Subscribers—It is unethical for an attorney to allow his name to be carried in a magazine or other publication, representing that he is attorney for a named organization and will furnish free legal advice to its members.

The Committee has been asked by a member of the Association for an opinion on the following statement of facts:

A trade magazine, in soliciting subscriptions from persons engaged in the business to which it related, stated that it operated a Legal Advice Service Department under the direction of the country's leading authority in the field of law pertaining to that business, in order to help its subscribers in solving their legal problems. It invited all subscribers to submit their questions to it, stating that the specialist would give subscribers the benefit of his advice free. It also stated that he contributes a monthly article to the magazine dealing with those phases of the law with which men in that particular business are continuously coming in contact, which service alone is worth many times the $3.00 subscription price and might easily save one engaged in the business hundreds of dollars.

A member of this Association inquires whether the attorney is guilty of unethical conduct in furnishing advice to the subscribers of this magazine or in writing the article for its pages, it being assumed that for each he is paid by the magazine.

The Opinion of the Committee was stated by MR. AILSHIE, Messrs. McCracken, Sutherland, Martin, Phillips, Arant and McCoy concurring.

There is no ethical or other valid reason why an attorney may not write articles on legal subjects for magazines and newspapers. The fact that the publication is a trade journal or magazine, makes no difference as to the ethical question involved. On the other hand, it would be unethical and contrary to the precepts of the Canons for the attorney to allow his name to be carried in the magazine or other publication in the manner indicated in the foregoing statement, as a free legal adviser for the subscribers to the publication. Such would be contrary to Canons 27 and 35 and Opinions heretofore announced by the Committee on Professional Ethics and Grievances. (See Opinions 31, 41, 42 and 56.)

Opinion 163

(August 22, 1936)

Collection by Attorney for Client—Impropriety of Attorney Disclosing Fact to Client's Creditors—It is improper for an attorney to advise any of his client's creditors that he has made a collection and that he will hold the money in order that the creditor may attach it.

A member of this Association inquires whether there is any impropriety in the conduct of an attorney for a plaintiff in a personal injury action, in advising his client's doctor and the hospital that the case has been

settled, that he holds his client's money and will continue to hold it for a short time so that the doctor and the hospital may attach it if the client refuses to pay their reasonable charges.

The Committee's opinion was stated by MR. MCCRACKEN, Messrs. Sutherland, Martin, Phillips, Arant, Ailshie and McCoy concurring.

"Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and except with the client's knowledge and consent should not be commingled with his private property or be used by him." Canon 11.

Under this Canon, it is the duty of a lawyer, when he makes a collection, to remit promptly to his client. Opinion 125.

Every lawyer owes his client a duty not to divulge to others what he learns about his client's business by reason of his confidential relationship. See Canon 37. For an attorney to make disclosures that result in the fund being subjected to an adverse claim, without his client's consent, is a clear violation of this duty. The lawyer is not his client's financial guardian. If he can properly furnish information to the doctor and the hospital regarding his client's funds, so that attachment may be made thereof, why not to the grocer, the tailor, the wine merchant, or any other creditor? He certainly cannot undertake to see that his client's bills are paid. Such a practice would destroy immediately the trust and confidence so essential to the attorney-client relationship; the client would insist that the money collected be paid to him directly; and the entire system of collection by counsel would break down.

It is our belief, therefore, that however meritorious the claim, and however desirous the lawyer be to recognize it and assist in its collection, he may do so only with his client's consent.

Opinion 164

(August 22, 1936)

Judicial Office—Propriety of Incumbent, Without Resigning, Becoming Candidate for Another Judicial Office—Judge, without resigning, may become a candidate for another judgeship.

The inquiry is whether it is proper for a municipal Judge, without resigning, to run for a district judgeship against the incumbent who seeks re-election.

The Committee's opinion was stated by MR. MARTIN, Messrs. McCracken, Sutherland, Phillips, Arant, Ailshie and McCoy concurring.

The American Bar Association, in 1933, amended Section thirty of its Canons of Judicial Ethics by providing that, "While holding a judicial position, he (a judge) should not become an active candidate . . . for any office other than a judicial office."

Plainly, the intent of the amendment is to permit one holding a judicial position to become a candidate for another judicial office, and this he may do unless the law of his state prohibits; conduct lawful may be unethical, but if unlawful can never be ethical.

Opinion 165

(August 23, 1936)

Adverse Interests—An attorney for several plaintiffs in an action for breach of contract does not accept employment from others in matters adversely affecting the interests of a former client, within the meaning of Canon 6, when one plaintiff declines to proceed with a pending action and the attorney, continuing to represent the remaining plaintiffs, names the former co-plaintiff as a nominal co-defendant in an amended petition for relief against the original defendant, solely for the purpose of bringing the former co-plaintiff before the court as a necessary or proper party.

Fees—An attorney may ethically seek to recover compensation from a former client for services rendered to him as co-plaintiff in a pending action, when the client has refused to continue as a co-plaintiff and the attorney has been required to name him as a nominal co-defendant, in order to bring him before the court as a necessary or proper party to the adjudication of the remaining plaintiff's rights.

A member of the Association has requested the opinion of the Committee with reference to the following facts:

An attorney is employed by A and B, owners of a gasoline service station, and by C, their lessee of the station and assignee of an interest in the contract of A and B with D, a refining company, for the sale by D to A and B of certain gasoline, to bring an action against D for damages for an alleged breach of the contract. C verified the complaint as one of the plaintiffs. D filed a motion to compel A and B to set forth the interest of C in the contract by virtue of the assignment. The motion having been granted, an amended petition was prepared by the attorney, but C refused to sign it, and indicated his wish to discontinue the litigation. Thereupon the attorney filed an amended petition for A and B against C and D as co-defendants. As to the original defendant, D, the allegations are substantially the same as those contained in the original petition. As to the co-defendant, C, the amended petition simply recites that with the consent of D, A and B sublet their service station to C, "who claims some interest in the contract," and who thereafter operated the service station with the knowledge and consent of D, under C's contract with A and B. The amended petition does not charge C with any wrongul acts, nor does it seek any affirmative relief as against C. We are asked whether the conduct of the attorney is ethical. We are also asked whether the attorney may ethically seek to recover from C compensation for his professional services in representing him, in the first instance, as a plaintiff in the action.

The opinion of the Committee was stated by MR. MCCOY, Messrs. McCracken, Sutherland, Martin, Phillips, Arant and Ailshie concurring.

We are of the opinion that the conduct of the attorney in naming C as a nominal co-defendant in the amended petition, under the circumstances stated, is ethical. While an attorney must not accept professional employment against a client or a former client which will, or even *may* require him to use confidential information obtained by the attorney in the course of his professional relations with such client regarding the subject matter of the employment (Canon 6; *Galbrith v. State Bar*, 218 Cal. 329, 23 P. (2d) 291), we are of the opinion that this canon of professional conduct does not preclude an attorney for several co-plaintiffs from subsequently naming one of them as a co-defendant simply for the purpose of bringing him before the court as a necessary or proper party to the adjudication of the rights of the remaining plaintiffs, when he does not seek affirmative relief against such party. The attorney is not thereby accepting "employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed." Canon 6.

We are also of the opinion that, under the circumstances stated, the attorney may, with propriety, seek

to recover from C compensation for his professional services while representing him, in the first instance, as a co-plaintiff in the action, bearing in mind, however the admonition of Canon 14 of the Canons of Professional Ethics, which declares that:

"Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud."

ANNOUNCEMENT OF 1937 ESSAY CONTEST CONDUCTED BY AMERICAN BAR ASSOCIATION PURSUANT TO TERMS OF BEQUEST OF JUDGE ERSKINE M. ROSS, DECEASED

INFORMATION FOR CONTESTANTS

Subject to be discussed:

"The Administration of Justice as Affected by Insecurity of Tenure of Judicial and Administrative Officers."

Time when essay must be submitted:

On or before March 1, 1937.

Amount of Prize:

Two Thousand Dollars.

Eligibility:

Contest will be open to all members of the Association in good standing, except previous winners, officers, members of the Board of Governors, and employees of the Association.

No entry will be accepted unless written specially for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted. Any essay not desired for further use by the Association will, upon request of its author, be returned and the interest of the Association therein waived.

No entry shall contain more than 10,000 words, including quoted matter and footnotes, but citations will not be counted. Each contestant must agree to abide by the decision of the Board of Governors in the selection of the winner and on any question raised.

Procedure:

Anyone wishing to enter the contest shall communicate promptly with Olive G. Ricker, Executive Secretary, American Bar Association, 1140 North Dearborn Street, Chicago, Illinois, who will furnish:

(a) entry number in quadruplicate, in a container sealed prior to receipt of any application, so that the number therein may be known only to the recipient;

(b) large envelope, addressed, for mailing essay;

(c) small envelope, addressed, for mailing one of the entry numbers together with printed form to be filled in by the contestant to show name and address; which will thereafter not be opened until the winning essay has been selected and its identifying number announced.

Essay is to be submitted in triplicate, typewritten, double spaced, on one side of plain white paper, letter size (8½x11), and mailed as first class matter, without folding, in the envelope furnished for that purpose, on or before March 1, 1937. Total number of words on each page shall be typed on bottom of each page of at least one copy. For identification, one of the entry numbers furnished for that purpose shall be affixed to each of the three copies of the essay. Any other identifying mark on the essay or on the envelope containing the same, or on the envelope containing the fourth number and the name and address of the contestant, will disqualify the entry.

The fourth entry number shall be attached to a printed form on which the entryman shall type his full name and address, sign the agreement printed thereon, and then seal for mailing in the envelope furnished for that purpose. The envelope, when prepared for mailing, will be held by the entryman until March 2, 1937, and then mailed. It is not to accompany the essay in envelope, which must be postmarked not later than March 1, 1937.

No additional information will be given by the Executive Secretary. Any questions raised will be submitted to the Board of Governors for consideration.

ANNOUNCEMENT OF PATRIOTIC ESSAY CONTEST UNDER AUSPICES OF AMERICAN BAR ASSOCIATION

The American Bar Association, through its Committee on American Citizenship, announces its first annual essay contest, to be conducted in the Teachers Colleges and Normal Schools throughout the United States. The Association is offering One Thousand Dollars ($1,000.00) in cash prizes to the writers of the four best essays on the subject selected.

Eligibility:

Any regularly registered student attending any Teachers College or Normal School in the United States is eligible to the competition.

Subject:

"How and to What Extent are the Rights and Liberties of the Individual Protected Under the Constitution of the United States?"

Procedure:

Any eligible student who wishes to submit an essay should write to:

Executive Secretary,
American Bar Association,
1140 North Dearborn Street,
Chicago, Illinois,

to obtain a *number*, with instructions as to its use in submitting the essay.

Date of Submission:

No essay will be considered for a prize unless it has been received by the Executive Secretary of the Association, 1140 North Dearborn Street, Chicago, Illinois, on or before April 1st, 1937.

Form of Submission:

Each contestant shall submit his essay in triplicate, typewritten, double spaced, on one side of plain white paper, letter size (about 8½ x 11), and mail as first class matter without folding. It shall not disclose the name of the writer or bear any distinguishing mark except the State in which his school is situated, the name of which State shall be typed at the top of the first page, and the number obtained from the Executive Secretary. The name of the author shall be submitted to the Executive Secretary in a separate envelope duly sealed, which envelope will be furnished for that purpose.

Length of Essay:

Not to exceed four thousand words, including footnotes, if any. Citations will not be counted among the four thousand words, but quotations will be counted,

whether included in footnotes or otherwise. The total number of words on each page shall be typed at the bottom of such page of at least one of the triplicate copies.

Prizes:

The following cash prizes will be awarded:

The writer of the essay awarded first place shall receive $400.00; second place, $300.00; third place, $200.00; and fourth place, $100.00.

The awards will be made by the Board of Governors of the American Bar Association, at the 1937 annual meeting of the Association in Kansas City, Missouri, upon the recommendation of a committee of three judges selected by the President of the Association.

State Bar Associations:

The President of each State Bar Association is asked to select a committee of three members of the American Bar Association within such State to act as judges of the contest for such State. In each State which advises the Executive Secretary that such a committee of judges has been appointed, the essays from such State will be submitted to that committee of judges, who will be asked to decide the two best essays from such State. Those two essays shall be returned by June 1st, 1937, to the Executive Secretary of the American Bar Association and will be the only essays from that State submitted to the committee of judges appointed by the President of the American Bar Association. No essays will be submitted to the said committee of judges which have not been so received from such a committee of a State Bar Association. Each State Association is invited to cooperate by offering prizes or awards for the essays submitted by students from such State. The Board of Governors of the American Bar Association reserves full discretion as to rules of the contest and the making of the award.

For any additional information desired, address:

Executive Secretary,
American Bar Association,
1140 North Dearborn Street,
Chicago, Illinois.

Legal Ethics and Professional Discipline

CHARACTER INVESTIGATION OF FOREIGN ATTORNEYS

BY recent action of its State Board of Law Examiners, Pennsylvania becomes the fifteenth state to adopt the character investigation plan of The National Conference of Bar Examiners. For the past two years The National Conference, which was organized in 1931 under the auspices of the Council on Legal Education and Admissions to the Bar of the American Bar Association, has made investigations of the past record and character of attorneys applying for admission on motion in one state by reason of a period of previous practice in another. Reports are made on the basis of a questionnaire filled out by the applicant and information obtained from his former associates, employers, bar association officials, grievance committee secretaries, credit agencies, and in some cases personal investigators. The service is financed by a charge of twenty-five dollars for each investigation, which is paid either by the state examining board or directly by the applicant. The Conference reports that it has completed 242 investigations. A resolution endorsing and recommending this work was passed by the American Bar Association at its meeting in Los Angeles in 1935.

AN INGENIOUS METHOD OF CIRCUMVENTING AMBULANCE CHASERS!

An aggressive campaign against ambulance chasers in Los Angeles conducted by a special local administrative committee of the California State Bar has resulted in the investigation of a number of lawyers and laymen, jail sentences for some and a marked cessation of their activities by others.

The first step in the campaign was the enactment of anti-ambulance chasing ordinances by the city and county, by which the solicitation of tort claims such as those growing out of automobile accidents was made an offense punishable by a fine of $500 or 90 days in jail or both. In order to make these laws effective, the bar committee obtains from the police department and the sheriff's office each day a list of the names and addresses of all persons reported injured in accidents. Letters of the following form are sent to each of these persons:

"Dear Madam:

The State Bar of California, with the active cooperation of the District Attorney, the City Attorney, and the Chief of Police of Los Angeles, is actively engaged in putting an end to the activities of 'ambulance chasers' and attorneys who traffic in personal injury litigation arising out of automobile and other accidents. This work is being done for your benefit and for the benefit of the public generally, in order that you may be protected from the greed usually exhibited by such persons.

"We are advised that you recently suffered personal injuries in an accident and we ask your cooperation. If, because of your accident, you are approached by anyone, whether lawyer or ambulance chaser, 'investigating officer,' 'adjuster,' or by whatever other name he may call himself, seeking employment by you on his own behalf or for another to represent you in an attempt to recover damages, we ask that you so advise us at once by telephoning Michigan 9551. All information, including the name of the person calling on you, his phone number and address, the license number of his automobile and the name and address of the persons for whom he is working, so far as you can secure these facts, will be of material assistance to us. Please keep any cards or papers that may be offered, and should you sign any papers, be sure to demand a copy.

"We believe that your cooperation will be of benefit to you as well as to others. Ambulance chasers are generous with their promises to pay your expenses, doctor's and hospital bills out of their share of any money paid to you by way of settlement. As a result of your dealings with them, you may well find yourself compelled to pay bills which you have never authorized, and at the same time receive only a small portion of the settlement.

"Your best protection is the advice of a competent and honest attorney. We ask your help in getting rid of those

who are not honest, and of the ambulance chaser who works with them.

Very truly yours,

Chairman, Special Local Administrative Committee Number One."

Thousands of such letters have been mailed out during the past months and have proved a valuable source of information to the committee, which, in many cases, has received the active cooperation of the injured person.

The committee has the services of a full time investigator and possesses broad powers, including the right to subpoena witnesses and examine them under oath. It meets weekly.

COURT MAY SUSPEND ATTORNEY ON ITS OWN MOTION WHEN HAVING ACTUAL KNOWLEDGE OF ATTORNEY'S MISCONDUCT

It has often been stated that the courts could be more helpful to the bar in disciplinary matters if they acted on their own motion in cases of misconduct occurring in their presence or of which they had actual knowledge. The recent case of De Krasner v. Boykin, decided by the Court of Appeals of Georgia, Div. 1, June 30, 1936 (186 S. E. 701), affirms the decision of the Superior Court of Fulton County, by a three judge court, where such action was taken.

Norman De Krasner was convicted by a jury in the Superior Court of Fulton County of certain charges which, as stated to him by the court, "if true would render you unworthy to appear before this court as a lawyer." That case was prosecuted to conviction by the Solicitor General of the circuit who had the backing of the bar association in the prosecution. The court at the request of De Krasner appointed a Solicitor General pro tem to prefer charges against the Solicitor General, which charges were presented to the county grand jury. The grand jury denounced the prosecution as malicious and commended the Solicitor General for the work he had done. De Krasner then presented to the Superior Court a petition for the disbarment of the Solicitor General, which the court set down for hearing. De Krasner appeared in court on the day set and moved for a judgment of disbarment on technical grounds. This was refused and a motion for continuance of the case was made and over-ruled. The court ordered De Krasner to proceed with the merits, which he refused to do, and the court then dismissed the disbarment proceedings and entered an order suspending De Krasner from the practice of law. At that time a motion for a new trial had been filed by De Krasner on the criminal charge of which he had been found guilty, but the motion had not yet been heard. A disbarment proceeding was pending against him in the same court. The court said:

"This procedure is somewhat similar to a summary punishment for a contempt committeed in the presence of the court. It is a power which should be exercised cautiously. Movant was present in court when the above facts were reeited to him, he made no effort to dispute their verity, he had been convicted of a crime involving moral turpitude, of which fact the court had actual knowledge, itself a conclusive ground for disbarment, disbarment proceedings had been instituted against him, he was guilty of conduct in the presence of the court considered by it as a contempt, and as action plainly showing movant unworthy of the privileges of the legal profession. Under all the facts, we do not think the court exceeded its power in suspending movant."

This judgment is supported by the reasoning given in the syllabus by the court, which reads as follows:

"An attorney at law, admitted to practice in the courts of this state, is an officer of the court. As such, the court may by virtue of an inherent power vested in it, admit, suspend, discipline, or disbar such attorney. For this no legislative permission is considered requisite; and if a statute exists, it is not regarded as exclusive in its provisions. In suspending the defendant in the present case, until disbarment proceedings already pending against him were disposed of, the court acted upon acts of the defendant which transpired in its presence and through its actual knowledge that defendant had been convicted of a crime involving moral turpitude, without any notice to the defendant of its intended action, except a recital to him of the facts upon which it would pass the order suspending him. *Held*, the court did not act beyond its powers in passing the order complained of."

MISSOURI DISCIPLINES ATTORNEYS FOR SOLICITING LAW BUSINESS

In two recent cases in the St. Louis Court of Appeals, attorneys were found guilty of unethical solicitation of business and disciplined. In the case of In re Noell (96 S.W. 2d 213) June 30, 1936, on charges brought by members of the Grievance Committee of the Bar Association of St. Louis, the evidence was held to support the charge that the respondent paid money to railroad employees to furnish confidential information which he used to procure employment by injured employees or their dependents to institute suits against railroad employers. The evidence in this case was brought out through an appeal taken by the respondent from a deficiency assessment made by the Commissioner of Internal Revenue against him in reference to income taxes for the years 1922 to 1925. In that hearing both the respondent and his representative testified at considerable length in reference to his expenses of carrying on business and the formal written appeal in the tax matter, sworn to by the respondent and signed by his counsel, contained numerous statements showing that he had paid and used large sums of money to secure his business as an attorney at law.

The respondent claimed that the rules of court under which the disbarment proceeding was brought, did not apply retroactively, that the action was barred by the statute of limitations, and he also interposed the defense of *laches*. The court ruled against him on all of these points, as well as on the defense of *res judicata* which was interposed by reason of the fact that similar charges had been preferred against the respondent in the Circuit Court of the City of St. Louis in 1924 and that upon trial he had been acquitted in that case.

The respondent's license to practice law was suspended for two years.

In another case, in re Gallant, 95 S.W. (2nd) 1249, Otis M. Gallant and Marion J. Hannigan were suspended for a period of one year in a disbarment proceeding instituted as a result of an information filed by the members of the Advisory Committee to the General Chairman of Bar Committees of Missouri. The evidence, according to the Court, showed that the respondents employed agents and runners for the solicitation of cases on a rather large scale. The firm

had in its employ a number of men who were not lawyers, at least two of whom spent much of their time in the solicitation of cases for respondents. These two men were paid a salary and all expenses and were supplied with printed contracts of employment in blank form. The Court held that evidence of transactions similar to those charged in the information was admissible because it tended to establish the concerted plan or manner of respondents in the conduct of their law business.

PAST RECORD OF DISCIPLINARY ACTION IS RELEVANT IN DISBARMENT PROCEEDING

The following statement is taken from the case of In re Miller 59 Poe. (2nd) 9, decided by the Supreme Court of Nevada, July 2, 1936:

"This is the third time petitioner has been before this court on charges of unprofessional conduct. In 1933 he was suspended from practice for six months for unprofessional conduct in the handling of certain clients' money. Between one and two years later he was again suspended from practice for the period of six months for delaying the settling up of an estate for nearly twenty years. In recommending disbarment, the Board of Governors took into consideration the two previous suspensions, as well as 'the numerous occasions on which he has been before the local administrative committee, this Board and the Supreme Court for disciplinary action, together with the known and confessed irresponsible method of practicing law, which endangers the general public and those members who may select him as their counsel.'

"[2] We do not decide whether the local administrative committee, the Board of Governors, and this court are entitled to take into consideration complaints for unprofessional conduct made against an attorney in proceedings wherein he has not been found guilty, but we are clearly of the opinion that the local administrative committee and the Board of Governors, as well as this court are not only entitled, but in duty bound, to consider an accused attorney's past record as to proceedings wherein disciplinary measures have actually been prescribed."

COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, ROBERT T. MCCRACKEN, CHAIRMAN.

A Critique of the Federal Court Rules Draft

(*Continued from page* 813)

counted to me by the English barrister who came over to testify on the case; but I did not join with him in his surprise at the imperfection of our Federal law of Evidence.

It is unthinkable that the present Draft should omit this opportunity to fill this real need by a few simple rules such as those of the California Code.

To conclude, here then are three improvements which call for consideration. These are (1) that the Advisory Committee re-open the whole question of Article 50, and consider the possibility of dealing adequately with the subject of Evidence; (2) that all statutory rules on any subject be incorporated in these Rules of Court, so as to make them into a compact Code, self-contained, and (3) that the sections be broken up into manageable size and be numbered according to the expansible method already in vogue in many States.

London Letter

Experts in Foreign Law.

THERE has recently been formed in London an "Institute of Experts in Foreign and Colonial Law." The inaugural meeting, convened by Mr. Barnett Hollander, a member of the New York Bar, was held in Prince Henry's Room over the Inner Temple Lane on the 19th May last. A letter had previously been sent to some seventy foreign lawyers practising in London, outlining the scheme for the formation of such an association, and, although only thirty-four lawyers were present at the first meeting, the proposal had been approved by all who had been notified. On the motion of Señor de Callejon (Spain), seconded by Maitre Allemes (France), who acted as Secretary, Mr. Hollander was unanimously elected to the chair. In his address to the meeting he stated that the object of such an association as he had in view was that of mutual assistance. From both social and professional points of view he outlined many advantages which might accrue to its members. The association, would, of course, be conducted in such a manner as was consistent with the rules of etiquette approved by the General Council of the Bar and the Law Society, and the members should co-operate with those bodies whenever possible. Mr. Hollander suggested that the various Consulates would be glad to have a list of foreign lawyers practising in London; that reciprocal arrangements might be made between members for assistance at preliminary inquiries on questions of foreign law; that a scale of minimum fees for attendance in Court, at conferences or on depositions might be discussed; as well as the extent to which a foreign lawyer's foreign practice might be affected by his membership of the English bar. Questions as to speculative and contingent fees—legitimate in certain countries, but disapproved of in this country—might also be considered. The rules of etiquette and standard of conduct to which its members would adhere would be such as to establish the repute of the Institute. It was also suggested that the names of Members might be included in the Law List and the Solicitors Diary as a special feature.

Questions were asked as to what qualifications were required for membership and it was suggested that any one practising or qualified to practice in foreign courts should be eligible, but that the mere holding of a university degree in law should not be sufficient. Signor F. del Guidico (Italy) asked if members would be required to furnish particulars of their respective qualifications and whether the value of such qualifications would be ascertained. He also pointed out that in his country the position was particularly delicate as lawyers were not entitled to practice and to call themselves barristers if they were not registered for political or other reasons, on the list of barristers. A somewhat similar situation was visualized with respect to former members of the Russian Bar. Dr. Idelson (Russia) referred to the difficulty in the case of several gentlemen from Germany who had left their country and were advising here on German law, some of whom were formerly judges or law professors in Universities. He suggested that membership should not be confined to qualified lawyers but that it should be extended to all who were experts in foreign law.

He added that the position of those who were like himself also members of the English bar would have to be considered so that nothing should be done which might in any way conflict with Bar etiquette. Others present having spoken it was resolved that the Chairman should appoint a committee of such members as he considered proper, to report further with an agenda for the next meeting; the committee to include one English barrister and one English solicitor. Señor de Callejon proposed that the committee should get in touch at once with the Bar Council and the Law Society in order to ascertain their views on the matter. This was agreed.

Since this first meeting other foreign lawyers in London have signified their approval of the formation of the association, bringing the total to 92. Of these 28 are also members of the English bar and 17 are solicitors, while 47 are neither members of the British bar nor solicitors.

There is no doubt that such an association, besides benefiting its own members, will be of great value to the profession generally. Hitherto it has been difficult at times for a British barrister or solicitor to obtain expert advice in matters concerning foreign law, but with a complete list of the association's members, such as it is proposed to issue, this difficulty should disappear.

Lord Trevethin.

By the death of Lord Trevethin, at the age of 92, which occurred on August 3rd last, the Middle Temple has lost its oldest Master of the Bench. He was admitted to that Inn of Court as Alfred Tristram Lawrence, son of David Lawrence of Wainwern House, Pontypool, county Monmouth, surgeon, in the year 1864. He was called to the Bar on the 26 January, 1869, became a Bencher of his Inn on the 13 May, 1892, and Treasurer in 1914. As a junior at the bar Lord Trevethin acquired a substantial practice and he did not become a Queen's Counsel until 1897. In 1904 he was raised to the High Court Bench and knighted, and his appointment was received with the unanimous approval of the Bar. It was not until 1921 at the age of 78 that he was appointed to the office of Lord Chief Justice of England—a position which he occupied for only ten months, being succeeded by the present Lord Chief Justice. He was created first Baron Trevethin in 1921.

Solicitors.

Under section one of the Solicitors Act, 1933, the Council of the Law Society may make rules for regulating the professional practice, conduct and discipline of solicitors. For some time past the Council has had under consideration the subjects of touting, undercutting, profit-costs sharing and legal aid organizations. Rules concerning these subjects have now been made and approved by the Master of the Rolls. They came into force on the 1st October, 1936, and will apply to every solicitor whether he is a member of the Law Society, or not. The rules provide that a solicitor shall not directly or indirectly apply for or seek instructions for professional business or do or permit any act or thing which can reasonably be regarded as touting or advertising or as calculated to attract business unfairly. It is well known that touting or advertising for work in England either by a solicitor or barrister is not only contrary to the etiquette of the profession but is also regarded as professional misconduct, and the Council thought it desirable to draw particular attention to this fact. The rules also deal with the difficult question of undercutting, and provide that a solicitor shall not hold himself out as being willing to undertake professional work in contentious matters at a scale of charges less than that fixed by Rules of Court, and in non-contentious matters at less than the charges prevailing in the district in which the solicitor practises. A solicitor must not, under the rules, agree to share with any person not being a solicitor or other duly qualified legal Agent practising in the United Kingdom, India or any British Dominion, Colony or Dependency his profit costs (fees) in respect of any business. In connection with the subject of legal aid societies it is provided that a solicitor shall not join or act in association with any organisation or person (not being a practising solicitor) whose business is to make, support or prosecute claims arising as a result of death or personal injury, including claims under the Workmen's Compensation Acts, in such circumstances that such person or organisation solicits or receives any payment, gift or benefit in respect of such claims, nor shall a solicitor act in respect of such a claim for any client introduced to him by such a person or organisation. The solicitor is charged with the duty of making reasonable inquiry before accepting instructions, to ascertain whether such acceptance would involve a contravention of these provisions. A solicitor may be struck off the Roll and fined a sum not exceeding five hundred pounds as the penalty for failing to comply with the Rules.

The Bill to amend the Solicitors Acts, to which reference was made in the London Letter in the June issue of the *Journal* (p. 432), has passed through its remaining stages and is now on the statute-book, having received the Royal Assent on the 16th July, 1936. The Act comes into operation on the 1st January, 1937.

Legal Education.

The Council of Legal Education in London, a body consisting of twenty Masters of the Bench of the Inns of Court, five of whom are nominated by each Inn, and to whom is entrusted the power and duty of superintending the education and examination of students for the Bar, has lately been increasing its activities with a view to providing a better and more comprehensive training for the profession of barrister-at-law. It is proposed to institute practical tutorial classes as part of the Inns of Court School of Law, to commence, it is expected on October 26th. The object of these classes is to assist students in the practical study required for Part ii of the Bar examination (popularly known as the Final examination), and to introduce students to the type of work and duty undertaken by the barrister-at-law. Details of the scope of this new course have not yet been issued, but it may be assumed that instruction in the preparation and conduct of cases will be included, and one may express the hope that the student may be taught where to find his law. In order to confer the benefit of personal instruction the number of students at each class will be limited. In connection with these classes it is interesting to note a reference to "The Inns of Court School of Law." This School of Law seems to have been alluded to for the first time in the Revised edition of the Consolidated Regulations of the four Inns of Court, which came into force on the 27th May last. Regulation 16 states that "For the purpose of providing for

students' education and training in the general principles and practice of law, and its administration in this country, systematic instruction shall be given at the Inns of Court School of Law under the supervision and direction of the Council of Legal Education." Whether or not this "School of Law" is a new institution does not appear but the term seems more likely to have been adopted as a convenient method of referring to the teaching activities of the Council. In any case it cannot be said to rank with the Law Schools of the Universities of the United States of America. S.

The Temple.

OFFICERS OF SECTIONS

1936-37

Bar Association Activities

Chairman, Morris B. Mitchell.....Minneapolis, Minn.
Vice-Chairman, Carl V. Essery.....Detroit, Mich.
Secretary, Herbert Harley.....Ann Arbor, Mich.

Council: Francis J. Carney, Boston, Mass., Julian P. Harrison, El Paso, Tex., Frank E. Atwood, Jefferson City, Mo., R. Allan Stephens, Springfield, Ill., Howard D. Bailey, Syracuse, N. Y., Raymer F. Maguire, Orlando, Fla., William W. Evans Paterson, N. J., R. Wayne Lawler, Houston, Tex.

Criminal Law

Chairman, Justin Miller.....Washington, D. C.
Vice-Chairman, Rollin M. Perkins.....Iowa City, Iowa
Secretary, Henry W. Toll.....Denver, Colorado

Council: The officers ex-officio and J. Weston Allen, Boston, Mass., Louis S. Cohane, Detroit, Mich., Sanford Bates, Washington, D. C., James J. Robinson, Bloomington, Ind., Albert J. Harno, Urbana, Ill., Earl Warren, Oakland, Calif., George A. Bowman, Milwaukee, Wis., Sylvester C. Smith, Jr., Phillipsburg, N. J.

Insurance Law

Chairman, Jesse A. Miller.....Des Moines, Ia.
Vice-Chairman, Oliver R. Beckwith.....Hartford, Conn.
Secretary, Howard C. Spencer.....Rochester, N. Y.

Council: The officers ex-officio and W. E. Stanley, Wichita, Kan., last Retiring Chairman, Merritt U. Hayden, Detroit, Mich., Lamar Hill, New York, N. Y., Lionel P. Kristeller, Newark, N. J., John W. Cronin, Boston, Mass., Eugene Quay, Chicago, Ill., John A. Luhn, Baltimore, Maryland, Howard D. Brown, Detroit, Mich., Joe S. Lewis, Ponca City, Okla.

International and Comparative Law

Chairman, James Oliver Murdock.....Washington, D. C.
Vice-Chairman, Phanor J. Eder.....New York, N. Y.
Secretary, John T. Vance.....Washington, D. C.
Ass't Secretary, Lionel M. Summers....Chevy Chase, Md.

Council: The officers ex-officio and Green H. Hackworth, Washington, D. C., Louis B. Wehle, New York, N. Y., Charles A. Beardsley, Oakland, Calif., John P. Bullington, Houston, Tex., William S. Culbertson, Washington, D. C., Edward Schuster, New York, N. Y., Frederick K. Beutel, Baton Rouge, La., John H. Wigmore, Chicago, Ill.

Advisory Committee: Nathan William MacChesney, Chairman, Chicago, Ill., Frederic R. Coudert, New York, N. Y., Edwin D. Dickinson, Berkeley, Calif., Roscoe Pound, Cambridge, Mass., James Grafton Rogers, New Haven, Conn.

Judicial

Chairman, Carl V. Weygandt.....Cleveland, Ohio
Vice-Chairman, John J. Parker.....Charlotte, N. C.
Secretary, Van Buren Perry.....Aberdeen, S. D.

Council: Joseph A. Moynihan, Detroit, Mich., Arthur J. Tuttle, Detroit, Mich., Augustus N. Hand, New York, N. Y., Marvin B. Rosenberry, Madison, Wis., James W. McClendon, Austin, Tex., George W. McClintic, Charleston, W. Va., Charles A. Goss, Lincoln, Neb., Henry T. Lummus, Boston, Mass.

Junior Bar Conference

Chairman, Joseph D. Stecher.....Toledo, Ohio
Vice-Chairman, Robert W. Pharr.....Memphis, Tenn.
Secretary, Paul F. Hannah.....Washington, D. C.

Council: The officers ex-officio and Walter L. Brown, Huntington, W. Va., last Retiring Chairman; Richard H. Field, Boston, Mass., Weston Vernon, Jr., New York, N. Y., Joseph Harrison, Newark, N. J., Henry Bane, Durham, N. C., Harold B. Wahl, Jacksonville, Fla., Seneca B. Anderson, Memphis, Tenn., Donald B. Hatmaker, Chicago, Ill., Ronald J. Foulis, St. Louis, Mo., Grant B. Cooper, Los Angeles, Cal., Frank F. Eckdall, Emporia, Kan., Charles E. Pledger, Jr., Washington, D. C.

Legal Education and Admissions to the Bar

Chairman, James Grafton Rogers.....New Haven, Conn.
Vice-Chairman, Oscar Hallam.....St. Paul, Minn.
Secretary, Alexander B. Andrews.....Raleigh, N. C.
Adviser, Will Shafroth.....Chicago, Ill.

Council: The officers ex-officio and John Kirkland Clark, New York, N. Y., C. E. Dunbar, Jr., New Orleans, La., W. E. Stanley, Wichita, Kan., R. G. Storey, Dallas, Texas., Charles H. English, Erie, Pa., R. Allan Stephens, Springfield, Ill., James E. Brenner, Stanford University, Cal., Theodore F. Green, Providence, R. I.

Mineral Law

Chairman, Charles I. Francis.....Houston, Tex.
Vice-Chairman, Stanley B. Houck.....Minneapolis, Minn.
Secretary, Peter Q. Nyce.....Washington, D. C.

Council: The officers ex-officio and D. M. Kelly, Butte, Mont., James A. Veasey, Tulsa, Okla., Donald C. McCreery, Denver, Colo., James C. Denton, Tulsa, Okla., George W. Nilsson, Los Angeles, Calif., Robert Stone, Topeka, Kan., J. V. Norman, Louisville, Ky., James L. Shepherd, Jr., Houston, Tex.

Municipal Law

Chairman, Arnold Frye.....New York, N. Y.
Vice-Chairman, Murray Seasongood.....Cincinnati, Ohio
Secretary, Charles W. Tooke.....New York, N. Y.

Council: The officers ex-officio and Steven B. Robinson, Los Angeles, Calif., Henry C. Whitehead, Passaic, N. J., James H. Pershing, Denver, Colo., Walter Chandler, Memphis, Tenn., Henry F. Long, Boston, Mass., Henry P. Chandler, Chicago, Ill., Morton Wallerstein, Richmond, Va., Charles M. Hay, St. Louis, Mo.

Patent, Trademark and Copyright Law

Chairman, Bert M. Kent.....Cleveland, Ohio
Vice-Chairman, Russell Wiles.....Chicago, Ill.
Secretary, Cyril A. Soans.....Chicago, Ill.

Council: The officers ex-officio and Thomas Ewing, New York, N. Y., Thomas E. Robertson, Washington, D. C., Jo Baily Brown, Pittsburgh, Pa., Milton Tibbetts, Detroit, Mich., Leonard S. Lyon, Los Angeles, Calif., George Ramsey, New York, N. Y., Robert Cushman, Boston, Mass., George L. Wilkinson, Chicago, Ill.

Public Utility Law

Chairman, Elmer A. Smith.....Chicago, Ill.
Vice-Chairman, Robert D. Garver.....Kansas City, Mo.
Secretary, Richard J. Smith.....New York, N. Y.

Council: The officers ex-officio and Leslie Craven, Washington, D. C., T. Baxter Milne, Washington, D. C., Ivan Bowen, Minneapolis, Minn., Walter S. Fenton, Rutland, Vermont, William G. Fitzpatrick, Detroit, Mich., Harold J. Gallagher, New York, N. Y., Douglas Arant, Birmingham, Ala., Walker Chandler, Memphis, Tenn.

Real Property, Probate and Trust Law

Chairman, Nathan William MacChesney.....Chicago, Ill.
Vice-Chairman, W. M. Crook.....Beaumont, Tex.
Secretary, James E. Rhodes II.....Hartford, Conn.

Council: The officers ex-officio and T. M. Shackleford, Jr., Tampa, Fla., Henry Upson Sims, Birmingham, Ala., Eleanor S. Burr, Boston, Mass., William C. Ramsey, Omaha, Neb., George E. Beers, New Haven, Conn., George C. Gertman, Washington, D. C., Mary F. Lathrop, Denver, Colo., Ralph H. Spotts, Los Angeles, Calif.

Real Property Division: R. G. Patton, Chairman.....Minneapolis, Minn
Probate Division: Henry Upson Sims, Chairman.....Birmingham, Ala.
Trust Division: George G. Bogert, Chairman..Chicago, Ill.

Letters of Interest

Boston Revisited or the Return of the Non-Native

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

My wife and I stood on deck of our boat carrying a full quota of passengers into Boston Harbor, the very morning that ushered in the annual conclave of the American Bar Association in Boston. Delighted with the scene presented by the approach to the harbor and the harbor itself with its reefs and light buoys, my mind wandered back some thirty-two years when, as a boy not yet ten, I was first privileged to see that picturesque New England shoreline of "the land of the free and the home of the brave."

As an immigrant lad going through that process known as "Americanization" there was instilled in me a reverence for Paul Revere and the Minute Men of Concord and Lexington, as well as for the many other hallowed shrines in and near Boston which are so closely identified with the Colonial and Revolutionary epochs of American history. However, my pilgrimage to Boston with the Bar Association last August afforded me my first opportunity to revisit one of the thrilling scenes of my early childhood.

And we were not disappointed. There was a thrill in every moment of our all too brief sojourn in this lovely old historic landmark. From beginning to end, our visit was blessed with "perfect" weather, and the accommodations which the lawyers of Boston and their wives so graciously and unstintingly provided for the entertainment of the visiting lawyers and their families will forever place them among the "Lord's chosen and anointed." Indeed, the daily trips to Plymouth, Salem, Manchester-by-the-Sea, Concord and Lexington and the many teas and luncheons at other interesting places were amazing in their scope and variety. Judging by the glowing reports made by many visiting women who, of course, did most of the sightseeing—the men being engaged nearly every morning and afternoon in their favorite indoor sport of deliberating, or rather, making speeches pro and con resolutions or reports and voting on them—there has never been another convention like it anywhere. It was a great pleasure from start to finish.

No sooner were we duly registered at the Convention headquarters and out of church (still a delightful and flourishing old fashioned institution among New Englanders) than a "scout" representing the official reception committee signed us up for a tour of "Old Boston." We visited the home of Paul Revere, Old State House, Faneuil Hall, Old North Church, King's Chapel, Old South Meeting House and the scenes of the Boston Massacre and the Boston Tea Party, then over to Cambridge—where we walked and drove about Harvard and its "Yard"—thence back to Boston by way of beautiful Boston College.

At the Paul Revere House our guide was not an American of Puritan stock but an Italian boy not yet in his 'teens who jumped on the running board of our car and in eloquent but strongly foreign accent told us the classic story of Paul Revere. The same thing happened at the Old North Church. It was amusing and, as the women said, it was "too cute for anything." But to me, a Swiss-born American, it was thrilling, too, and recalled the halcyon days of my first years in this country struggling with the English (or should I say American) language and rejoicing how fortunate I was coming as I had from the world's oldest surviving democracy to the newest.

Boston Common was enchanting. We had to cross it every day going to and from our hotel to the Convention halls. Our comings and goings were always over a different route converging upon the spot where every late afternoon all varieties and conditions of men were assembled arguing among themselves, regarding the personality of God, fascism vs. communism, the revolt of the masses, religion vs. atheism, the decisions of the Supreme Court, and, indeed, the fate of the world in general. This free and open forum attracted the amused attention and admiration of many a prominent lawyer who had come to Boston that week with a speech up his sleeve in defense of those very "inalienable rights." But I found the discussions of these ragged men in the Commons much more fascinating than the most learned discourses heard during the week in the august surroundings of well cushioned seats and portiered hotel salons.

As the heated debates in and out of committees and the many resolutions and reports which were filed, tabled, passed and defeated, pass out of memory (only to be resurrected soon by way of tomes of printed paper) I am sure that those of us who visited Boston will forever remember the hospitality and kindness shown by our hosts. We came away from that citadel of our founding fathers so sacred to the memory of every lover of American institutions, with indelible impressions of the grandeur of our Republic, which in the midst of a distraught world is seeking to steer a clear course and keep its balance "with Justice and Liberty to all."

For these timely lessons in the light that is still being shed by our historic past, We Salute You, Boston!

JOSEPH CONRAD FEHR.

Washington, D. C.

Current Events

(*Continued from page* 755)

Prize, "The Administration of Justice as Affected by Insecurity of Tenure of Judicial and Administrative Officers," and fixed the prize at $2,000;

Reiterated the Association's stand in favor of a law against use of the United States mails in advertising of Mexican divorces; and

Voted not to authorize the release and publication at this time of the report of the Committee of the Section of Criminal Law, as to the Hauptmann trial; the whole subject of excessive publicity interfering with fair trial of judicial and quasi-judicial proceedings being in the hands of a joint committee representing newspaper publishers, editors, and the Association.

The Board of Governors which took office upon the adjournment of the Annual Meeting selected Kansas City as the place for the Sixtieth Annual Meeting, and left the fixing of the time of the meeting to the Committee on Arrangements; and made the necessary administrative arrangements and assignments for the operation of the new structure of organization of the Association.

The Wisconsin Bar Association has established a new placement service for young lawyers. The Association is acting as a clearing house for graduates from the two Wisconsin law schools to give assistance in obtaining locations.

The Milwaukee (Wisconsin) Bar Association hold regular monthly meetings in the auditorium of the Marquette Law School in the shape of legal clinics. A recent meeting was devoted to discussions of amendments to the Wisconsin Practice Code. At a dinner meeting of the Association with the Junior Association in May, John F. Tyrrell, handwriting expert, and Arthur Koehler, of Madison, told of their experiences in the Hauptmann trial, in which the former testified as a handwriting expert and the latter identified the ladder.

News of the Bar Associations

Connecticut State Bar Association Holds First Meeting Under Reorganization Plan—Delegates from County and Local Associations Hold Convention—Chief Justice Maltbie Speaks of Regulating Publicity in Sensational Trials—Other Addresses

THE first meeting of the State Bar Association of Connecticut under the reorganization plan was held at the County Courthouse in Hartford on September 3rd and 4th. A Committee of the Bar had been engaged for a period of four years in working out the reorganization of the association upon the plan of the American Bar Association, and the annual meeting was devoted to the perfection of the various new organizations brought into existence under the revised Constitution.

On Thursday morning, September 3rd, a convention of delegates from the various county and local bar associations throughout the state was held. This organization is analogous to the formerly existing Conference of Bar Delegates in the American Bar Association, and was created for the purpose of coordinating the activities of the various associations throughout the state. An address of welcome was given by the President of the State Bar Association of Connecticut, Mr. Hugh M. Alcorn, of Hartford, and an address was given by Mr. Warren F. Cressy, of Stamford, Chairman of the General Reorganization Committee. Various special committees were set up for the consideration of questions of interest to the Bar throughout the state, which are to furnish the basis of the program for the meeting next year. Mr. Cressy was elected president and Mr. Arthur L. Corbin, Jr., of New Haven, vice-president, and Mr. John Hamilton King, of Willimantic, secretary, of the Board of Delegates.

The afternoon session was devoted to the organization of sections, for which temporary chairmen had been selected and suitable addresses arranged. Organizations were perfected and officers elected. The names of the sections and of the presidents chosen, are as follows:

Real Estate and Title Examination, Mr. Edwin F. Morse, of New Canaan, president.

Criminal Law, Hon. Newell Jennings, Judge of the Superior Court, president.

Practice and Procedure, Including Regulation of the Practice of Law, Mr. William B. Gumbart, of New Haven, president.

WARREN B. BURROWS
President, Connecticut State Bar Association

Probate and Estate Practice, Including Succession and Estate Taxation, Hon. William W. Bent, Bridgeport, president.

Bank and Trust Company Law, Mr. Frederick H. Wiggin, of New Haven, president.

These sections were very largely attended and it was the general impression that the reorganization by this method would work out with the success that has attended the section method wherever attempted.

Among the notable addresses given to the sections were those by Mr. Charles M. Lyman, of New Haven, on "Mortgages on Subdivided Property"; Hon. Newell Jennings on "Sentencing the Guilty," and by Dean Charles E. Clark of Yale Law School on "Proposed Rules of the Supreme Court of the United States for Practice in the District Courts."

On Friday, September 4th, the assembly meetings of the association were held, and an address by Professor Edwin M. Borchard of Yale Law School upon the subject of "Neutrality" was of exceeding interest. Hon. Farwell Knapp, Assistant Tax Commissioner, also presented a report on Cooperation Between the Bar and Certified Public Accountants. The report of the Reorganization Committee was presented and accepted.

Hon. Warren B. Burrows, of Groton, was elected president of the State Bar Association for the ensuing year, Hon. Frederick H. Wiggin, of New Haven, vice-president. and Mr. James E. Wheeler, of New Haven, secretary and treasurer.

The annual banquet of the association was held at the Hartford Club on Friday evening. Hon. William M. Maltbie, Chief Justice of the Supreme Court of Connecticut, gave an address relative to the regulation of publicity in sensational trials, and particularly with relation to the admission of newspaper men from without the state, in which he suggested that in so far as the courts of Connecticut are concerned, such representation should be confined to the two leading press associations, that representatives of individual newspapers from without the state should not be admitted, and that under no circumstances should photographers or radio announcers be permitted within the courthouse. The Hon. Philip J. McCook, a Judge of the Supreme Court of the State of New York, and formerly a member of the Connecticut Bar, gave a series of interesting reminiscenses of his experiences upon the Supreme Bench.

The new president, Mr. Burrows, was formerly United States District Judge for the District of Connecticut, and has also served as Attorney General for the State of Connecticut.

WARREN F. CRESSY,
Secretary Pro Tem.

The Committee on Professional Economics of the New York County Lawyers Association have recently reported the result of their extensive survey on economic conditions of members of the Bar Association practicing in the city of New York. The report is accompanied by interesting drafts and tables and furnishes a mine of information for members of the bar interested in this subject.

Mississippi State Bar Holds Successful Meeting—President Frank E. Everett Speaks on Work of the Organization—Junior Bar Section Created—Proposed Changes in Civil Procedure Discussed—Dean Kimbrough Elected to House of Delegates

THE thirty-first annual meeting of the Mississippi State Bar was held in Greenville on September 3-4, 1936. The association was entertained in such a manner as only the delta can entertain, and everyone was of one accord in their opinion that Greenville was indeed the "Queen City of the Delta."

The convention was presided over by Judge Frank E. Everett, who had met every expectation in his able leadership during the past year. After an invocation by Dr. J. W. Ward, the association was welcomed on behalf of the City of Greenville and the Washington County Bar by Judge Percy Bell. The response was made by Judge G. Garland Lyell, one of Jackson's most popular and prominent attorneys.

Judge Frank E. Everett, president, gave an enlightening address, it being in the nature of a report of the activities and accomplishments of the Mississippi State Bar, and setting forth certain matters to be considered by this annual meeting. It is believed that much interest will be aroused in the individual lawyers as a result of this message.

The Association was honored in having as its principal speaker for the occasion, Hon. Lamar Hardy, U. S. District Attorney for the Southern District of New York, who explained some of the problems that confront the Department of Justice in the Southern District of New York, and the part it plays in the program of crime suppression. Judge Hardy is one of Mississippi's native sons, and it was indeed a pleasure and a privilege to have him present. His address was received with enthusiastic applause and he was greeted with warm cordiality.

Hon. W. S. Welch, Secretary of the Chancellors' Association, which was organized at the last annual meeting, brought an interesting report from this association. Certain rules with regard to practice and procedure in Chancery Court were adopted.

The resolution providing for an amendment to the constitution to make the judges of various courts appointive from a list submitted by the Bar Association was lost, as was a proposed amendment to the By-Laws with reference to the submission of proposed legislation to the State Legislature.

The Mississippi State Bar unanimously endorsed a resolution with regard to the appointment of Judge Edwin R. Holmes to serve on the Circuit Court of Appeals of the United States for the Fifth Circuit, a part of which is quoted below:

"Resolved, That the Mississippi State Bar unqualifiedly and unreservedly endorse the record of Judge Edwin R. Holmes as said District Judge as being a fair, just, able, and conscientious judge, and also unqualifiedly and unreservedly endorse his appointment to said Circuit Court of Appeals, and cordially and heartily thank our distinguished Attorney General for his recommendation, and our matchless President for his appointment of Judge Holmes. and those members of the Senate of the United States who voted for his confirmation, and most especially our own great Senator, Pat Harrison, who unflinchingly, unswervingly, and unfalteringly led the fight in behalf of Judge Holmes."

There was much discussion, led by Hon. John Brunini of Vicksburg, pertaining to proposed changes in procedure in civil matters. This was participated in largely by the younger members of the bar. A proposal to give the supreme court the power to increase inadequate verdicts—just as it has the power to reduce in case of excessive verdicts—was adopted. Proposals seeking to reduce the six-year statute of limitations for bringing of personal injury suits to a less number of years, and to change the venue in personal injury cases to the county in which the injury occurs, were lost.

The matter of raising the standards of legal education and admission to the bar was carried over to be considered at the next annual meeting of the State Bar.

Of much interest and vital importance to the younger lawyers was the creation of a committee of the State Bar known as the Junior Bar Section. This group is to be under the leadership of Hon. Hugh N. Clayton of New Albany, Chairman, and Hon. Jesse H. Graham of Meridian, Vice-Chairman. The entire bar is expecting much from this group since most of them have already expressed quite an interest in the activities of the association.

Judge T. C. Kimbrough, Dean of the University Law School, University, Mississippi, was elected to the House of Delegates of the American Bar Association.

The Mississippi State Bar will be under the guidance and direction of the following officers for the ensuing year: Hon. David E. Crawley, Kosciusko, President; Hon. W. G. Roberds, West Point, Vice-President; and Hon. Hugh N. Clayton, New Albany, Second Vice-President. The State Bar Commission has been privileged to have Mr. Crawley, our president-elect, as a member for the past four years, and no other member of the Bar could be better informed as to the purposes, accomplishments, and needs of the organization, or better fitted to lead the membership to greater fields of endeavor and higher standards of achievement.

The next annual meeting will be held in Meridian, the time of meeting having been changed by vote of the association from the first of September to the middle of June, 1937.

ALICE NEVELS,
Secretary.

New Mexico State Bar Holds Annual Meeting—President Botts Reports Board of Commissioners Has Given Special Attention to Ideal of a Non-Partisan Judiciary—Committee Reports on This Subject

THE annual meeting of the State Bar of New Mexico was held in Raton, New Mexico, on August 14 and 15, 1936. Retiring President Clarence M. Botts, of Albuquerque, delivered an address reviewing the accomplishments of the past year. In that address he stated that the present Board of Bar Commissioners during the past year "have given special attention to the ideal of removing the judiciary from the influence of party politics." The Committee which has functioned with Judge Botts during the past year in making a study of the feasibility of providing a non-partisan method of selecting judges in New Mexico is composed of Judge Sam G. Bratton, former Justice John C. Watson and Assistant Attorney General Quincy D. Adams. A discussion of this subject was made the important work of the meeting and consumed all of the first day.

Hon. Sam G. Bratton, Judge of the United States Circuit Court of Appeals, Tenth Circuit, of Albuquerque, New Mexico, spoke on the "Progress of the Committee on a Non-Partisan Judiciary." In his address he referred to an invitation extended to the Federation of Women's Clubs, Press Association, Educational Association, Railroad

ALVAN N. WHITE
President, New Mexico Bar Association

Brotherhood, State Tax Payers' Association, Bankers' Association, Cattle Growers' Association, Wool Growers' Association, American Legion, Veterans of Foreign Wars, Kiwanis and Twenty-Thirty Clubs to attend a conference with his Committee to discuss the subject. He stated that prompt and encouraging co-operation was the response and that each group was intensely interested and took an active part in the conference. Out of this conference a special or sub-committee was selected, which has now submitted a tentative plan. This plan provides that a judiciary council be created consisting of state officials and laymen and that such council submit a list of names from which the Governor would appoint the Judge or Justice.

Judge Bratton for the Committee did not recommend any specific plan at this time, and urged the meeting to give the matter further careful consideration, but to refrain from making any choice of plan now. He said: "It is believed to be the part of wisdom to proceed with caution, even with attending delays, in an effort to secure the active and effective aid of other groups rather than to press forward with undue haste in the proposal of a plan which may not meet with their approval, and, for lack of supporting public opinion, fail of accomplishment."

Robert L. Stearns, Dean of the Law School of the University of Colorado, presented an interesting address full of valuable information concerning this same general subject, "A Non-Partisan Judiciary in Theory and Practice."

Daniel T. Kelly, of Santa Fe, New Mexico, an outstanding business man of the state, not a lawyer, addressed the meeting on "A Layman's Reaction to the Proposal for a Non-Partisan Judiciary."

There was active participation in the discussion of the subject by many members attending the meeting. Judge Bratton's request, however, was observed and the Committee of which he is chairman was continued with an expression by the members of the State Bar assembled of appreciation for the work that he and his committee have done, and for the active cooperation of the civic and other organizations.

J. O. Seth, of Santa Fe, on the morning of August 15th, delivered a most interesting and informative talk on the proposed rules for United States District Courts, to govern in both law and equity cases. Discussion followed, all relating to the draft of these rules prepared by the U. S. Supreme Court Advisory Committee.

The meeting closed with an address by John T. Barker, of Kansas City,

Missouri, on the subject "Will the Co-ordination Plan Improve the Bar?" Mr. Barker dwelt also on the influence of the bench and bar today. His address was very interesting and was well received.

Entertainment features included a banquet and dance on the evening of August 14th, luncheon and cards for the ladies at noon of the same day, and a scenic drive for the ladies in the morning of August 15th, which took them over the beautiful mountain pass adjacent to Raton. The State Bar is especially indebted to E. C. Crampton, Chairman of the Entertainment Committee, and F. S. Merriau, President of the Colfax County Bar Association, for the perfect appointments and arrangements for the meeting.

Officers for the ensuing year were elected by the Board of Commissioners as follows: Alvan N. White, Silver City, President; Charles H. Fowler, Socorro, First Vice-President; H. A. Kiker, Raton, Second Vice-President; Herbert Gerhart, Santa Fe, Secretary-Treasurer.

HERBERT GERHART,
Secretary-Treasurer.

North Carolina State Bar Hears Address by President Stinchfield of the American Bar Association—Treasurer's Report Shows Healthy Condition—Law Students Attend in Force—Addresses—New Officers

THE third annual meeting of The North Carolina State Bar (the integrated bar) was held at the Sir Walter Hotel, Raleigh, October 16, 1936, with a fine representation of lawyers throughout the State.

The address of welcome was made by Attorney General A. A. F. Seawell, which was responded to by Hon. Don A. Walser, of Lexington.

The report of the Secretary-Treasurer showed the State Bar to be in a healthy condition both as to membership and as to finances.

Silent tribute was paid to the memory of twenty-two members who died during the past year.

Following the report of the Executive Committee, an address was made by Hon. Frederick H. Stinchfield, President of the American Bar Association, on the "Function of the American Bar Association with Relation to State Bar Associations."

Greetings from the North Carolina Bar Association (the old voluntary organization) were extended by President B. S. Womble, of Winston-Salem.

A statement as to the work of the committee in regard to a proposed constitutional amendment for increasing the membership of the Supreme Court was made by Chairman Chas. G. Rose, of Fayetteville, evoking considerable interest.

The morning program was concluded with an address by Judge J. Will Pless, Jr., of Marion, on the subject "A Judge Looks at the Court."

The afternoon session was featured with a masterful address by Col. O. R. McGuire, General Counsel to the Comptroller General, Washington, D. C., on the subject "He (the President) Shall Take Care That the Laws Be Faithfully Executed."

Gordon Gray, Esq., of the Winston-Salem Bar, spoke with much interest on the subject "As the Young Lawyer Sees the North Carolina State Bar." This was followed by a statement as to the work of the Board of Law Examiners from ex-Judge L. R. Varser, Chairman of the Board.

The following present officers were re-elected: President, Julius C. Smith, Greensboro; Vice-President, Chas. G. Rose, Fayetteville; Secretary-Treasurer, Henry M. London, Raleigh.

The large attendance of lawyers was augmented by the presence of over a hundred law students from the three approved law schools of the State at the University of North Carolina, Duke University and Wake Forest College, accompanied by Deans Van Hecke and Horack and Dean Emeritus Gulley.

An interesting feature in connection with the meeting was an informal judicial conference-luncheon attended by seventeen of the twenty-three Superior Court Judges, which it is expected will be an annual affair.

HENRY M. LONDON,
Secretary.

Left to Right: Col. O. R. McGuire, Chairman, Special Committee on Administrative Law; Julius C. Smith, President North Carolina State Bar; Frederick H. Stinchfield, President American Bar Association

South Dakota State Bar Has Meeting at Sioux Falls—Junior Bar Organized

THE annual meeting of the State Bar of South Dakota was held at Sioux Falls on August 6th and 7th. Two hundred and fifty members were in attendance.

Following the address of welcome and response, by Mr. B. O. Stordahl, President of the Minnehaha County Bar Association, and Mr. R. F. Williamson, Vice-President of the State Bar, respectively, a number of reports by officers and committees of the Association were made. Mr. D. J. O'Keeffe, President, then made the annual address, his subject being "The Lawyer—His Profession."

At a luncheon given by the Minnehaha Bar Association, at the Izaak Walton League Club House, Hon. William L. Ransom, President of the Amer-

R. F. WILLIAMSON
President, South Dakota State Bar

ican Bar Association, addressed the members on "Next Steps in the Work of the Organized Bar."

Other able addresses during the meeting were made by Hon. H. B. Rudolph, Judge of the South Dakota Supreme Court, his subject being "Declaratory Judgments," and by Hon. Edward R. Burke, U. S. Senator from Nebraska, who spoke on "Our Constitution."

One of the most important acts of the meeting was the organization of a Junior Bar.

The annual dinner, on the evening of the second day, was in the nature of a gridiron program, put on by the Junior members of the Minnehaha Bar.

Officers elected for the ensuing year are as follows: President, Ray F. Williamson, Aberdeen; Vice-President, George Williams, Rapid City; Treasurer, L. M. Simons, Belle Fourche; Secretary. Karl Goldsmith, Pierre.

Commissioners, 1st Circuit, W. W. French, Yankton; 2nd, Roy E. Willy, Sioux Falls; 3rd, Alan L. Austin, Watertown; 4th, B. W. Baer, Woonsocket; 5th, George H. Fletcher, Aberdeen; 6th, C. E. Noel, Highmore; 7th, George Williams, Rapid City; 8th, Chas. R. Hayes, Deadwood; 9th, H. J. Bushfield, Miller; 10th, Harry Westphal, Gettysburg; 11th, H. O. Lund, Winner; 12th, D. R. Perkins, Lemmon. At Large: George Philip, Rapid City; Harold O. Lovre, Hayti; J. T. Medin, Sioux Falls.

CARL GOLDSMITH,
Secretary.

Virginia State Bar Association Has Large Attendance at Annual Meeting—Committee Appointed to Arrange for Celebration of Fiftieth Anniversary of Association in 1938—Reaffirms Integrated Bar Plan—State Bar Delegate Elected

THE annual meeting of The Virginia State Bar Association was held at the Cavalier Hotel, Virginia Beach, August 6th, 7th and 8th, with Stuart B. Campbell, the President, presiding and more than three hundred members in attendance, being next to the largest meeting in the history of the Association.

Unusually interesting reports were made by the several committees. The Committee on Legal Education and Admission to the Bar recommended further increasing the standard of admission to the Bar; the Committee on Legislation and Law Reform proposed several measures to expedite the administration of justice; the Committee for Cooperation with the American Bar Association and the Special Committee appointed to consider ways and means of selection of members of the General Council and of members of the State Council of the American Bar Association both reported in favor of approving the plan of reorganization of the American Bar Association; and the Committee on Unauthorized Practice of Law recommended changes in Virginia Statutes to combat unauthorized practice.

Several resolutions were adopted authorizing the President to appoint a Committee on the better housing of the Supreme Court of Appeals of Virginia and of the State Law Library, a Committee on Cooperation with the Virginia Law Review, a Committee to Arrange for the Fiftieth Anniversary of the Formation of the Association which occurs in 1938, and a Committee on Cooperation with the United States Constitutional Sesquicentennial Commission. The Association reaffirmed its continued advocacy of the plan to integrate the Virginia Bar following the report of the legislative efforts of the Committee to secure the enactment of appropriate legislation at the One Hundred Ninety Third session of the Virginia General Assembly.

The officers elected for the ensuing year are: James G. Martin, President; W. Marvin Minter, John Y. Hutcheson, Morris M. Lynch, J. L. Tompkins and W. R. Saunders, Vice-Presidents, and Cassius M. Chichester, Secretary-Treasurer. Mr. Stuart B. Campbell was elected the delegate of the Association to the reorganized American Bar Association and Mr. Robert T. Barton, Jr., of Richmond, was appointed Chairman of the Committee on Cooperation with that Association.

JAMES G. MARTIN
President, Virginia Bar Association

Vermont Bar Holds Fifty Ninth Annual Meeting—Notable Addresses Delivered

THE fifty-ninth annual meeting of the Vermont Bar Association was held in the National Life Insurance Company's building in Montpelier on October 6 and 7 with a good attendance.

The report of the Secretary showed a membership of 316, and 13 new members were added at the meeting. The retiring President, Hon. J. Ward Carver of Barre, gave a fine address on "Lawyers and Bar Associations." Hon. Sherman R. Moulton, Justice of the Supreme Court, read a paper on the "Life of Dudley Chase," U. S. Senator and Chief Judge of Vermont Supreme Court, which showed scholarly research of a high order and which was very interesting. Memorial addresses were given on Addison E. Cudworth of Londonderry and Charles S. Chase of Brattleboro.

Harry C. Shurtleff of Montpelier delivered an address entitled "It Has Happened Here," which showed former instances of autocratic authority in the United States.

Two notable addresses were given: one by Judge Ira Lloyd Letts of Rhode Island on "Declaratory Judgments," and the other by Hon. Joseph E. Warner of Massachusetts on the "Lawyer in Politics." General Warner spoke about the value of law in a democratic form of government and specially of its vital importance in the relations of the people to the government. As a part of its value is the challenge of the time to the lawyers to explain its importance to the people. He also suggested the plan of securing State adoption of Federal standards by means of Federal aid.

The usual committee reports were made with several recommendations as to proposed changes in the statutes of the state.

The following officers were elected for the coming year: Charles F. Black, Burlington, President; Arthur L. Graves, St. Johnsbury, James P. Leamy, Rutland, and Neil D. Clawson, Brattleboro, Vice-Presidents; Harrison J. Conant, Montpelier, Secretary; Webster E. Miller, Montpelier, Treasurer; Horace H. Powers, St. Albans, Member of Board of Managers; Hon. George B. Young, Montpelier, Delegate to the House of Delegates of the American Bar Association.

The meeting adjourned to December 19th, when it is planned to hold a meeting in celebration of the seventy-fifth birthday of Chief Justice Powers.

H. J. CONANT.
Secretary.

Fifth Judicial District (Minn.) Association Elects Officers

At the annual meeting of the Fifth Judicial District Bar Association held at Owatonna, Minnesota, on the 2nd day of May, 1936, attended by a representative group of the lawyers of the district, the following officers were elected: President, C. D. Simpson, West Concord; Vice-President, John McLoone, Waseca; Secretary, Charles N. Sayles, Faribault; Treasurer, Otto J. Nelson, Owatonna.

CHARLES N. SAYLES,
Secretary.

Wyoming State Bar Association Hears Interesting Addresses—Bar Integration Committee Reports on Bill It Is Preparing—Questionnaire to Be Conducted to Ascertain Members' Preference As to Type of Measure—Entertainment Features

THE Wyoming State Bar Association held its regular annual meeting on the 21st and 22nd days of August at the Federal Court Room in Sheridan, Wyoming, with a very good attendance. The program was a very full one with a number of carefully prepared and well delivered papers and was as follows:

President's address, "The Bar Faces a New Era"—Hon. H. Glenn Kinsley.

"The Supreme Court and the New Deal"—Hon. G. R. Hagens.

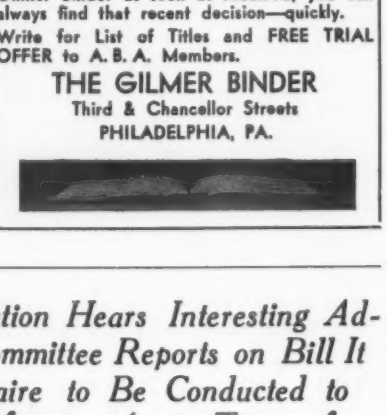
"Is the Constitution Adequate?"—Hon. Robert R. Rose.

"The Federal Constitution and the United States Supreme Court"—Hon. Marion A. Kline.

"Unconstitutional" in England and America—Hon. George T. McDermott, U. S. Circuit Judge of 10th Circuit.

"History of the Personal Character of Obligations"—Hon. Fred H. Blume, Justice of Supreme Court of Wyoming.

In addition to the above papers, reports were prepared and presented by the various standing committees of the association. The report of Hon. J. Reuel Armstrong, Chairman of the Bar Integration Committee, reported at length upon a bill the Committee was preparing for adoption. Several types of bills were discussed and the Chairman was directed to prepare and send to each member of the Bar of the State a copy of two drafted bills, and instructed to ascertain from the members of the profession, by means of a questionnaire. the form of bill, if any, they favored.



P. W. SPAULDING
President, Wyoming Bar Association

The entertainment features of the meeting included a banquet at Piney Inn, a beautiful mountain resort near Sheridan, on the evening of the 21st. Hon. R. E. McNally of Sheridan presided as toastmaster and a number of the members responded briefly.

The membership and the ladies were entertained at the beautiful ranch home of Mr. and Mrs. Goelet Gallatin, near Big Horn, Wyoming. on the evening of August 22nd, where an elaborate buffet supper was served in the beautiful gardens of the host.

The following were elected as officers for the ensuing year: President, Payson W. Spaulding, Evanston; 1st Vice-President, Harry B. Durham, Casper; 2nd Vice-President, Ernest J. Goppert, Cody; Secretary-Treasurer, L. C. Sampson, Cheyenne. Executive Council, President and Secretary Ex-Officio; R. E. McNally, Sheridan; Alex B. King, Casper; Bard Ferrall, Cheyenne.

L. C. SAMPSON, Secretary.